DOMINANT DECISION CUES IN LABOR ARBITRATION:
STANDARDS USED IN ALCOHOL
AND DRUG CASES

DISSERTATION

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By

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During the past twenty years, extensive research has been conducted concerning the judgmental processes of labor arbitrators. Previous research, sometimes referred to as policy capturing, attempted to identify the criteria or standards used by arbitrators to support their decisions. Much of the research was qualitative. Due to the categorical nature of the dependent variables, log-linear models such as logit regression have been used to examine decisional relationships in more recent studies.

The decision cues used by arbitrators in 249 published alcohol- and drug-related arbitration cases were examined. The justifications for arbitrators' decisions were fitted into Carroll Daugherty's "seven tests" of just cause. The dominant cues were proof of misconduct, the appropriateness of the penalty, and the business necessity of management's action. Foreknowledge of the rule by the grievant and the consequences of a violation, equal treatment of the grievant, and an appropriate investigation by management were also important decision cues.
In general, grievants in alcohol and drug arbitration cases fared as well as grievants in any other disciplinary arbitrations. However, when the cases were analyzed based on the legal status of the drug, illicit drug users were at a considerable disadvantage.
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CHAPTER I

INTRODUCTION

Americans have a paradoxical relationship with drugs, both the licit and illicit variety. Americans are both a "drug loving culture" (Bureau of National Affairs 1986, 1) and a nation on the verge of hysteria over increasing problems associated with illicit drugs (Wicker 1988). It is estimated that a large majority of the adult population have, at some time, used substances that alter behavior.

A wide variety of drugs exist which are capable of altering moods and behavior. They include the familiar intoxicants, alcohol and marijuana, as well as hard drug substances such as heroin and cocaine. Tranquilizers and amphetamines are widely abused prescription drugs. Even over-the-counter drugs such as cold remedies can be misused. Medical experts contend that much of the population goes to work each morning dulled by the lingering effects of sleeping pills or other drugs (Bureau of National Affairs 1986, 1).

The National Institute of Drug Abuse defines drug users as adult Americans, aged twelve or older, who have consumed a drug at least once in the past thirty days. According to their 1985 survey, less than .5 percent of all adults are
current users of heroin, 3 percent use cocaine and 10 percent use marijuana (National Institute on Drug Abuse #C-84-3). Comparatively speaking, the use of illicit drugs is considerably less than the use of alcohol—59 percent of American adults currently use alcohol. According to the Surgeon General of the United States, alcohol kills 125,000 Americans each year (Gorman 1988, 56). In comparison, cocaine and opiates account for approximately 6,000 deaths per year.

Annual federal expenditures for anti-drug efforts are enormous. Congress approved $4.1 billion for these programs in 1989 and asked for $6.5 billion for 1990 (Dallas Morning News 1989, 3A). These funds support drug-related programs of thirty federal agencies and do not include additional funds allocated at state and local levels. Unfortunately, only 15 percent of the federal anti-drug budget is allocated for research, education and treatment. The balance of the funds support enforcement efforts, which are believed by some to be largely ineffective (Coulson and Goldberg 1987, 9).

Determining the costs of alcohol and illicit drug use in the workplace is not an easy task. Estimates of these costs are speculative and exact amounts are unknown (Bureau of National Affairs 1986). Despite these limitations, a reasonable estimate of the annual cost of lost production
and medical treatment due to alcohol and drug use is near $100 billion (Denenberg and Denenberg 1983, v).

Zack (1989, 105) considers the use of alcohol and drugs to be an insidiously pervasive problem in the workplace. Employees working under the influence of drugs or alcohol are risks to their own safety and the safety of others, and are a potential threat to equipment, products and productivity. Denenberg and Denenberg (1983, v) believe that the careers of millions of workers are jeopardized by alcoholism and drug addiction.

Issues related to alcohol and drugs present special challenges to labor arbitrators. There are attitudinal differences among industrial relations practitioners as to the proper handling of alcohol and drug-related problems (Denenberg and Denenberg 1983, v). Although there is general agreement in the medical community that alcoholism is a disease (Klerman 1989, 394), there are no guarantees that employers, unions and arbitrators treat it, or drug addiction, as such. In some industrial contexts, alcoholism and drug addiction may be treated as disciplinary problems, while in other contexts, alcoholism and drug addiction are viewed as illnesses which require treatment and rehabilitation.

Despite the fact that social and economic costs related to alcohol are much greater than those related to illicit drugs, there is evidence that arbitrators tend to rule more
favorably for alcohol users than for users of illicit drugs (Coulson and Goldberg 1987; Denenberg 1983; Denenberg and Denenberg 1983; Greenbaum 1982; Levin and Denenberg 1976; Marmo 1984/1985; Provost et al. 1979).

Issues related to labor arbitration have been examined extensively. However, little information is available regarding the standards, policies, or decision cues that arbitrators use in making their decisions (Stahl and Cain 1981, 189; Gross and Greenfield 1985, 645). While these issues have been analyzed and discussed in general terms, few studies have examined them specifically or statistically. As a consequence, the criteria an arbitrator relies upon to resolve a dispute are not completely understood. Exactly how an arbitrator combines and weighs issues such as management rights, fairness, and the language of the contract when making a decision is also unknown.

An additional problem relates to consistency among arbitrators. Stahl and Cain (1981, 189) found no support for the generally-accepted view that considerable consensus exists among arbitrators in the selection of decision-making standards.

Arbitral decision cues related specifically to alcohol and drugs are even less understood. Studies in these areas (Coulson and Goldberg 1987; Denenberg and Denenberg 1983) are qualitative and general in nature. They examine a wide range of issues but do not provide definitive explanations
of dominant decision cues in alcohol and drug cases. While some studies suggest inconsistencies in the treatment of alcohol and drug cases by arbitrators, it appears that no one has applied statistical analyses to support these conclusions.

Statement of the Problem

The problems with which this study is concerned can best be presented in the form of questions. The questions are:

1. What are the dominant decision cues in disciplinary labor arbitration cases involving alcohol and illicit drugs?
2. Do the dominant cues vary depending on the substance involved?
3. Are arbitrators consistent in the decisional cues relied upon in the cases studied?
4. Are arbitrators consistent in the treatment of alcohol and drug cases or does the legal status of the substance impact the award?

Purpose of The Study

This investigation concerns the dominant decision cues or standards which guide labor arbitrators in making decisions in cases related to alcohol and drugs. Three sub-problems are also examined. First, specific analysis is performed to determine if dominant decision cues vary depending on whether the dispute is alcohol or drug related.
Second, an analysis of the consistency of decision cues selected is performed. Third, arbitration awards are examined to determine if grievants in alcohol-related cases receive more favorable treatment by arbitrators than their drug-related counterparts.

**Hypotheses**

For purposes of the study, the following hypotheses are tested.

**Hypothesis one.** The dominant decision cues for arbitral decision-making will be those traditionally relied upon by arbitrators in disciplinary cases. These cues are the seven tests of just cause: proper notification of rules and consequences, the reasonableness of management’s action, proper investigation, fair investigation, proof of misconduct, equal treatment and the appropriateness of the penalty.

**Hypothesis two.** The dominant decision cues for arbitral decision-making will not be significantly different in alcohol-related cases and drug-related cases.

**Hypothesis three.** There will be consistency among arbitrators regarding the selection of decision cues.

**Hypothesis four.** Grievants in alcohol-related cases will tend to receive more favorable arbitral awards than grievants in drug-related cases.
Hypothesis five. Based on an examination of published awards only, differences in the treatment of grievants in alcohol-related cases compared to the treatment received by grievants in drug-related cases cannot be explained in terms of the intent of the parties, as embodied in the collective bargaining agreement, or by past practice.

**Significance of The Study**

This study is justified for several reasons. First, issues related to alcohol and drugs are timely and important to the future direction of arbitration. The cost of licit and illicit substance abuse to society is enormous. As previously noted, estimates of production losses and medical costs are measured in the billions of dollars. Political action and mass media coverage related to alcohol and drugs is extensive and ongoing.

Society is evidently experiencing a rapidly-growing illicit drug problem that may threaten this country’s social and economic stability. This situation, coupled with a considerably larger problem related to alcohol use, calls for more research and information for coping with such problems in the workplace.

Second, many studies have examined arbitral decision-making cues and standards. Examples are the works of Teele (1962), Gross (1967), Landis (1977), Cain and Stahl (1983), Leap and Stahl (1985), and Gross and Greenfield (1985).
These studies, as well as others, enhance the understanding of the decision-making processes of arbitrators and are documented in prominent journals. This research seeks to expand the accumulated body of knowledge related to arbitral decision-making by analyzing new areas of consideration.

Third, previous studies related to alcohol, drugs and arbitration have been confined to qualitative case analyses of published arbitration awards. Statistical methods used by Cain and Stahl (1983) and Leap and Stahl (1985) have not been applied in alcohol- and drug-related arbitration cases, therefore the significance of previously identified decision standards is unknown. There has been no segregation or statistical evaluation of drug and alcohol cases to determine the significant differences. Previous assertions in journals and other sources indicating disparities in the treatment of grievants by arbitrators have, likewise, not been statistically substantiated. While there appears to be evidence of different treatment, as noted before, it seems apparent that no research has included enough cases or performed the necessary statistical analyses to justify such claims.

The use of rigorous statistical methods in arbitral decision-making is a relatively new phenomenon. Cain and Stahl (1983) and Leap and Stahl (1985) first introduced the use of regression analysis into the examination of arbitral decision-making. Stahl (1989) suggests that, while these
methods are not new to the study of decision-making per se, they are new to the analysis of decision-making in arbitration contexts. Analyses of this type may strengthen the conclusions regarding labor arbitration decisions and may motivate others to examine arbitral decision-making more quantitatively.

Fourth, much of the research related to alcohol and drugs is dated. It is possible that, because of more public awareness programs about the harmful effects of alcohol, arbitrators now view alcohol and drug cases as essentially the same type of problem. On the other hand, widespread publicity about the so-called "drug epidemic" may be causing an even greater disparity in the treatment of grievants in drug- and alcohol-related cases.

Fifth, this research may benefit industrial relations practitioners. As a result of significant findings, labor arbitrators could compare their own attitudes toward alcohol and drugs to decision cues used by their peers. A greater awareness of standards influencing arbitral decision-making may help management and union leaders to better analyze their positions when preparing for a hearing.

In a similar vein, research of this nature may expose potential legal liabilities to the parties of collective bargaining agreements. Will alcoholism and drug addiction eventually be treated as a legally-protected handicap? Can
an employer legally defend the provision of different
treatments for alcoholics and drug addicts?

Sixth, analysis of published arbitration awards
presents the opportunity for a better understanding of
organizational decision-making in general. There are few
occasions in the workplace where decision processes are
documented. An examination of these awards may allow
insight into the dynamics of decision-making within an
organization.

Finally, if drug users and addicts are treated less
favorably than their alcohol counterparts, the issue can be
examined in terms of present and future social and ethical
considerations. If disparate treatment exists, can it be
justified socially, morally or ethically?

Definition of Terms

The following terms have restricted meanings and are
defined for purposes of this study.

Abuse or substance abuse occurs when the use of alcohol
or drugs chronically impairs work performance.

Arbitration is the same as rights arbitration.

Arbitrator is a person engaged in rights arbitration.

Collective bargaining agreements are the contracts in
effect between unions and employers, describing the rights
and duties of each party.
Common law of the shop is, unless otherwise indicated, limited to the agreements and practices of the specific parties to a collective bargaining agreement, rather than a body of practice within an industry.

**Contract** is the contract in effect between the union and the employer, describing the rights and duties of each party.

**Decision cues** are the standards, criteria or themes used by an arbitrator to justify decisions.

**Dominant value themes** are the same as decision cues.

**Drugs**, unless otherwise indicated, refers to illegal drugs.

**Illicit drugs** are the same as drugs.

**Industrial relations practitioners or decision-makers** are the three primary parties involved in the arbitral context: the employer, the union, and the arbitrator.

**Interest arbitration** is arbitration over the terms of a new contract.

**Licit drugs** include any legal, mood- or behavior-altering substance, such as alcohol.

**Psychoactive drugs** are any drugs, including alcohol and prescription drugs, that alter the user's mood or behavior.

**Rights arbitration** is the arbitration of grievances arising from the interpretation or application of the collective bargaining agreement.
CHAPTER II

LITERATURE REVIEW

The purpose of this chapter is to provide a general overview of arbitral decision-making, to connect the specifics of the topic to other themes, and to examine literature and research related to the research areas.

This chapter provides a brief history of labor arbitration. The legal framework for arbitration is examined and the contrasts between decision-making in arbitration and the American court system are presented. An examination of the legal framework and the contrasts with the American court system is necessary in order to demonstrate the wide selection of decision cues available to the arbitrator. It is important to understand that arbitral decision-making involves considerably more than simply comparing testimony and evidence presented at the hearing to appropriate contract language. In reality, the arbitrator can consider many sources in the decision-making process, including personal values and beliefs.

In addition, literature and research related to arbitral decision-making in general are examined. Also included is a closer analysis of articles dealing specifically with arbitral decision-making as it relates to alcohol
and drugs as well as an examination of the concept of just cause.

**Historical Background**

Labor arbitration is the voluntary resolution of disputes between employers and unions by a mutually acceptable party. While it is relatively new, having largely developed since the latter part of the nineteenth century, arbitration as a method for settling disputes may be as old as civilization itself. Arbitration was used for many centuries before the beginning of English common law. There is also evidence suggesting that Egyptians arbitrated disputes over 3500 years ago, as did Homeric Greeks in the ninth century B.C. (Elkouri and Elkouri 1973, 2; Trotta 1974, 13).

In the late 1800s, labor arbitration developed as a result of widespread reaction to the adverse social and economic impact of labor strikes (Trotta 1974, 13). Concerns of employers, labor organizations and the general public prompted political action at both state and federal levels to provide for labor arbitration as a method for resolving labor-management disputes.

Third-party labor arbitration was relatively uncommon at the turn of the century and during the period before World War I (Landis 1977, 2). It gained national prominence, however, when arbitration was used to resolve
major strikes in the coal and railroad industries in the early years of the nineteenth century. Although there was steady growth in the use of labor arbitration over the next few decades, by the 1930s only about 10 percent of collective bargaining agreements contained clauses providing for arbitration (St. Antoine 1984, 9).

Labor arbitration received a significant boost as a result of national priorities during World War II. Because of the war effort, national production rose sharply, which in turn increased the number of labor strikes. Concerned that production losses due to strikes were a threat to national security, the President took action to stabilize labor-management relations. In 1941, the National Defense Mediation Board was established to mediate labor disputes which were detrimental to national defense. Largely ineffective, the Board ceased to function in late 1941, prompting the President to establish the National War Labor Board (Trotta 1974, 17-18).

The National War Labor Board’s primary function was to prevent strikes and lock-outs by encouraging the use of arbitration as a final step in dispute resolution. The board could mandate contract terms when the parties could not negotiate them, and often inserted arbitration clauses when parties failed to settle disputes on their own. As a result of the National War Labor Board’s influence, the use
of arbitration in dispute resolution rose sharply by the mid-1940s (St. Antoine 1984, 9).

The popularity of labor arbitration continued to grow and the post-war years were characterized by an expanded application of labor arbitration for resolving disputes. The growth continued over the next few decades, and by 1984 approximately 95 percent of all major collective bargaining agreements contained provisions for final and binding arbitration (St. Antoine 1984, 9).

**Legal Framework**

Arbitral decision-making operates within a legal framework that is relatively stable. Elkouri and Elkouri (1973, 26) maintain that, "by and large the law has played a relatively limited role in labor-management arbitration in the United States." While court decisions have altered some of the rules in arbitration, it is, according to Fleming (1965, 28), still basically a private system of jurisprudence.

However, in 1960 the Supreme Court decided three cases, known as the Steelworkers' Trilogy, which had major impact on labor arbitration. These three cases were so controversial that they generated a substantial amount of literature to document related comments and critical evaluations (Prasow and Peters 1983, 55).
Arbitral decision-making was not one of the trilogy's major issues. However, the language of the decisions may have had unintentional effects on arbitral decision-making processes. The following narrative focuses on those effects and the observations made by commentators after the Trilogy decisions.

Fleming (1965, 23) stated that the central issue resolved by the trilogy cases was whether their collective bargaining agreements required the parties to arbitrate. The court resolved the issue affirmatively, but the language of the written opinions created new issues. Justice Douglas, the chief architect of the trilogy opinions, inserted language in the opinions which critics claimed excessively expanded the authority of the arbitrator and allowed undue discretion in decision-making (Prasow and Peters 1983, 63).

Gross (1967, 6) suggests that, after the trilogy, concern deepened among those who already believed that arbitrators were too willing to act as "industrial statesmen." Many worried that arbitrators would decide cases with less concern for the collective bargaining agreement and the evidence, and would rely more on their personal views of justice (Fuller 1962, 11).

Opponents of the trilogy reasoned that arbitrators were inclined to be impractical idealists (Prasow and Peters 1983, 64). Much of the apprehension among employers was
understandable. They feared that arbitrators, when allowed greater discretion, would pose a threat to management’s right to control its own affairs (Fleming 1965, 26). Teele (1962, 85-86) suggests that even before the trilogy, arbitrators, particularly in complicated cases, had to rely on something more than the collective bargaining agreement. Sounding more positive about the future, he observes that the trilogy allows arbitrators to examine publicly what they previously wrestled with in private. In the final analysis, however, Teele contends that arbitrators remain true to the contract and rely on other considerations only in unusual circumstances.

Landis (1977, 10) detected language in the trilogy that both expanded and limited the role of arbitrators. Landis points out the fact that the following language allowed arbitrators more freedom in decision-making.

The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished (Warrior and Gulf Navigation Co. 1960, 582).
When the arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsman may never have thought of what specific remedy should be awarded to meet a particular contingency (Enterprise Wheel Corp. 1960, 597).

Landis suggests, however, that this role of the arbitrator was limited by language elsewhere in the opinions. As the following quotation indicates, the arbitrator was admonished not to stray too far from the collective bargaining agreement.

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to his obligation, courts have no choice but to refuse enforcement of the award (Enterprise Wheel Corp. 1960, 597).

After the trilogy, arbitrators were granted discretionary authority not shared by judges (Kovarsky 1974, 69) and have since had a relatively free hand in shaping the principles of arbitral decision-making (Gullett and Goff 1980, 663). In addition, the trilogy provided that the courts could not review the merits of the case or resolve ambiguities in the opinion. The courts could only decide whether the arbitrator acted within the authority prescribed in the collective bargaining agreement (Kovarsky 1974, 71).
In effect, this meant that arbitrators could resolve issues with little concern about court intervention or review.

Contrast With the Court System

Labor arbitration is a unique contribution of the American system of industrial jurisprudence (St. Antoine 1984, 9). One of its distinct characteristics is that it allows the arbitrator to make decisions based on a variety of considerations. This becomes apparent when arbitral decision-making is contrasted with the decision-making power of judges in the American court system. There are many similarities and differences between the arbitral and court contexts. Three of the differences in the two areas of decision-making are particularly noteworthy.

The limitations applied to the presentation of evidence during the hearing represent an important contrast. In the courts, these limits are narrowly defined, while arbitration guidelines for admissible evidence are much broader. In the absence of a directive by the parties to the contrary, the arbitrator is not bound by any formal rules of evidence (Hill and Sinicropi 1980, 1).

Because arbitration hearings are fact-finding in nature, arbitrators allow the parties to present a liberal amount of relevant and irrelevant testimony and evidence (Elkouri and Elkouri 1973, 254). According to Shulman (1955, 1017), this practice was justified because strict
rules of evidence prevent an arbitrator from obtaining important and relevant information for resolving the dispute.

The purpose of limits on testimony and evidence in a court proceeding is to prevent jurors from being influenced by irrelevant information. Jurors are typically untrained in their mission and often cannot accurately discriminate between relevant and irrelevant evidence. The arbitrator, on the other hand, is a trained expert in the area of industrial jurisprudence and can weigh the value of the presented evidence to determine its relevancy.

Ideally, the arbitrator's decision-making is not influenced by irrelevant testimony and evidence in the case under consideration. Some contend, however, that arbitrators are influenced to some degree by all things that transpire at the hearing. Alexander (1962, 5) suggests that a person's behavior is a reflection of everything that has been experienced. The implication is that the arbitrator, like all people, is influenced by the totality of personal experiences when making decisions.

Arbitrators may consider a wider variety of factors than judges when making decisions. The judge is required to consider precedents in common law as a his guide, whereas, the arbitrator is not bound by an existing body of common law when making a decision. Furthermore, the arbitrator has
significant freedom to connect a decision to a variety of considerations (Gullett and Goff 1980, 663).

Another contrast between the decisions of arbitrators and judges is the comparative finality of the arbitrator’s award. Fleming (1961b, 244-245) is not entirely correct when he states that the word of the arbitrator is final, however court intervention into arbitration rulings is uncommon (Gullett and Goff 1980, 663). The arbitrator is, therefore, less restricted in decision-making by the potentiality of subsequent judicial review; providing the freedom to exercise significant discretion.

Related Literature and Research

The purpose of this section is to review related literature and research from two perspectives. First, arbitral decision-making is analyzed in a general sense. This includes the standards, or decision cues, that arbitrators apply in decision-making. Second, a more detailed analysis is made of specific issues and research related to alcohol and drugs in arbitral decision-making. Finally, the concept of just cause in disciplinary cases and quantum of proof issues are examined.

Arbitral Decision-Making

Arbitrators rely on a variety of decision cues in decision-making. However, it is not within the scope of this review to examine all cues, principles and standards
that guide arbitrators in this process. Decision cues often vary in importance because of the nature of a particular dispute. Decision cues that may be related to the research are introduced in this section in a general way.

Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award (Enterprise Wheel Corp. 1960, 597).

It was this trilogy language that established the collective bargaining agreement as the primary source for dispute resolution. This principle is reinforced throughout the literature. Strong support for the collective bargaining agreement as the primary source in arbitral decision-making can be found in the works of Cox (1959), Davey (1961), Fuller (1962), Gullett and Goff (1980) Shulman (1955), and Spohn (1947).

As previously noted, the language of the trilogy allowed the arbitrator to use discretion when looking to other sources for inspiration. This was permissible as long as the decision was drawn primarily from the collective bargaining agreement.

The collective bargaining agreement is a legislative document (Teple and Moberly 1979, 31). As such, it outlines and describes the substantive and procedural terms and
conditions that govern the relationship between management and union. Collective bargaining agreements are not, however, perfect documents. In Shulman's words,

No matter how much time is allowed for the negotiation, there is never enough time to think every issue through in all its possible applications, and never ingenuity enough to anticipate all that does later show up . . . there is never, of course, enough time to do an impeccable job of draftsmanship. . . . (Shulman 1955, 1004).

Cox agrees, "One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages" (Cox 1959, 44).

Because the contract is not always clear and may be ambiguous, the arbitrator may view the words of the collective bargaining agreement as statements of principle and interpret them broadly, or may consider them laws of the plant and interpret them strictly. The narrow and liberal construction of the language of collective bargaining agreements has been extensively examined in the literature (Cox 1959; Davey 1961, 1167; Fuller 1962; Spohn 1947; Shulman 1955). Davey asserts that there is no clear consensus among arbitrators on a preferred approach.

Since the language of the collective bargaining agreement does not always provide enough guidance for making decisions, the arbitrator has to consider other decision cues. One such cue is the practice of the parties. As Cox (1959, 44) points out, the interpretation and application of the contract is not limited to the documented words of the
agreement. Much of what is considered part of the collective bargaining agreement is unwritten (Gullett and Goff 1980, 666; Mittenthal 1984, 191). Consequently, practices performed regularly over a long period of time can obligate the parties and, in some situations, can nullify the language of the agreement. Under some circumstances, the arbitrator may even consider pre-contract discussions in resolving the dispute (Gullett and Goff 1980, 666).

The arbitrator may also rely on what Cox (1959, 45) calls the "common law of the shop." Dworkin (1974, 201) refers to this as the contemporary standards within the industrial community, and the past practices and understandings of the parties. Although the specific context in which the parties function is of primary importance to arbitral decision-making, Cox believes that the common law of the shop involves more. Cox’s expansive view was supported in the trilogy,

the arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—i.e., past practices of the industry and the shop—is—equally a part of the collective bargaining agreement although not expressed in it (Warrior and Gulf Navigation Co. 1960, 585).

Arbitrators have different opinions about the scope of the common law of the shop. Elkouri (1989) suggests that most arbitrators view it as being limited to the specific context of the parties, while others include practices in the industry as part of the common law of the shop.
Abrams (1981, 564) believes that the arbitrator's first allegiance is to the parties' collective bargaining agreement, but he emphasizes that the arbitrator may also look beyond the express agreement and prior practices of the parties. To do this, the arbitrator employs what Abrams refers to as established arbitral principles. These are widely accepted guidelines that have been developed through dispute resolution under collective bargaining agreements in the labor-management community.

Prior arbitration awards are another source of guidance for arbitrators. Several companies publish prior awards (Bureau of National Affairs, Commerce Clearing House, Prentice-Hall and LRP Publications) and the citation of prior awards is common practice in the arbitral process. Both parties may cite prior awards to support their positions. Arbitrators, too, cite prior awards in their opinions in order to support their reasoning and, sometimes, to show that their awards are consistent with other awards (Gullett and Goff 1980, 666).

It is difficult to determine the influence of prior awards on arbitrators' decision-making processes. Labor arbitrators are not bound by principles established by former decisions as are court judges (Domke 1961, 1; Dworkin 1974, 205; Sirefman 1960, 32). In a study related to the value of prior awards, Jennings and Martin (1978, 105) concluded that prior awards have no significant impact on
the way arbitrators decide cases. Furthermore, they found that arbitrators tend to ignore or refute prior arbitration awards cited by the parties.

Dworkin (1974, 206) suggests that community standards may also influence arbitral decision-making. There are regional differences in community standards and Dworkin maintains that decisions may vary because of these differences. Taking a broader view, Trotta (1974, 30) contends that the arbitrator is an instrument of industrial society and must take into consideration the generally accepted standards of social justice in making decisions.

The decision cues for arbitral decision-making have, to this point, involved considerations external to the personal views of the arbitrator. Arbitrators are not mechanical thinking machines. Like all decision-makers, arbitrators examine the contents of the proceedings and evaluate them, partly on the basis of these external frames of reference, and partly on internal personal values and beliefs.

Fleming (1961a, 245, 249) was not the first to suggest that there was more to arbitral decision-making than simply evaluating facts in light of the contract, past practices and other external considerations. The focus of his study was related to procedural irregularities in arbitration hearings. Fleming interviewed many arbitrators during his study, and, beyond his findings related to procedural irregularities, concluded that few arbitrators are willing
to accept a totally passive role or to strip their minds of matters not related to the dispute. Fleming suggests that arbitrators often rely on their personal theories for resolving controversies.

Teele (1962) analyzed 295 discharge cases to determine the dominant decision cues used by arbitrators to justify their decisions. The cues he identified were the contract as written, local practice, general practice, established precedents and the arbitrator's reliance upon some personal standard. Among other findings, Teele suggests that arbitrators sometimes rely on their own personal standards (Teele 1962, 96).

A few years later, Gross conducted qualitative research in the area of arbitral decision-making. As the first to study value judgments specifically in this context, he coined the term "dominant value themes" to describe those cues on which arbitrators rely to justify their decisions. Gross' work was primarily based on published awards related to subcontracting and out-of-unit transfers of work. He found that efficiency was the dominant value theme in subcontracting cases (Gross 1967, 62).

Landis conducted an extensive qualitative analysis of the arbitration decisions of Saul Wallen. His purpose was to determine if Wallen's personal values played a significant role in his decision-making. Landis reviewed a total of 500 of Wallen's cases and made three general conclusions.
First, Wallen often relied on personal values and his own expertise. Second, Wallen relied on three decision cues in making his decisions: productive efficiency, industrial relations stability and equity. Finally, Landis found that Wallen, in contrast to the traditional judicial role of the arbitrator, frequently took a consultative or problem-solving approach to arbitration (Landis 1977, 1, 164).

Scott and Taylor analyzed 146 published awards to determine the major decision cues related to absenteeism cases. They concluded that arbitrators were generally consistent in the way they decided cases and identified the following eight cues that had the greatest effect on the decision-making: the employer’s reason for the discharge, existence of a related policy, consistency, employee’s awareness of the rules, management’s adherence to its own policies, progressive discipline, employee tenure and an investigation into the reasons for the absences (Scott and Taylor 1983, 61).

Cain and Stahl’s (1983) work may be the first use of multiple regression analysis to examine arbitral decision-making. Stahl (1989) contends that multiple regression analysis is used frequently in research related to decision-making in contexts other than arbitration. Cain and Stahl’s goal was to capture the decision policies of three different arbitrators. For their study, they selected thirty published cases of each arbitrator and analyzed the
relationship between the arbitrators' decisions and seven
decision cues. These cues were: management rights,
contract language, past practice, fairness, effect on the
employee, negotiating history and prior awards (140). They
concluded that arbitrators were consistent in their deci-
sion-making and that they used the same criteria to justify
their decisions (Cain and Stahl 1983, 140-146).

Gross and Greenfield found, as did Gross in a 1967
study, that the study of personal beliefs and values in
arbitral decision-making has been largely ignored in the
labor law and labor arbitration literature. Their qualita-
tive study focused on health and safety disputes in 584
published awards from 1945 to 1984. Confirming that value
premises in decisions of labor arbitrators do exist, Gross
and Greenfield concluded that management rights are clearly
the dominant value in safety and health disputes. The
research revealed a "classic illustration of how the
acceptance of a certain value judgment determines a deci-
sion-makers whole orientation when deciding an issue" (Gross

Leap and Stahl examined decision cues in 144 published
medically-based arbitration awards. Ten cues commonly
associated with these cases were identified and analyzed,
using regression techniques. An employee's work record and
seniority had the most bearing on the outcomes of these
cases (Leap and Stahl 1985, 559).
Alcohol, Drugs and Arbitral Decision-Making

Literature and research specific to the arbitration of alcohol and drug cases are discussed in this section. Particular attention is given to decision cues and differences in arbitrators' rulings on these cases.

Levin and Denenberg analyzed eighty arbitration awards and surveyed members of the National Academy of Arbitrators to determine how arbitrators view drug abuse. They identified several factors important to arbitrators when deciding on cases related to drug abuse (97). These include degree of proof, contract language, company rules, impact on company operations, whether the drug was "hard or soft," rehabilitation, and other issues. Levin and Denenberg did not quantitatively examine decision cues, and they drew no conclusions as to which factors were most important to the arbitrators (Levin and Denenberg 1976, 97).

Provost et al. described the results of their research related to alcohol and drug use in two articles (1978/79 and 1979). In the 1979 article, they compared the ways in which companies and arbitrators handle drug and alcohol cases. They examined thirty-seven published alcohol-related cases and thirty-six cases related to illicit drugs and discovered several important issues. Company rules, the degree and type of evidence, and the severity of the issues were important determinants of arbitral decision-making. Provost and his colleagues also found that arbitrators gave more
favorable consideration for rehabilitation to alcoholics than they did to drug abusers (Provost et al. 1979, 253).

Wynns analyzed arbitration standards in drug discharge cases. Her qualitative study of forty drug discharge and suspension cases extensively examined the problems of proof. Wynns analyzed four traditional standards applied by arbitrators when making decisions. These were plant rules or contract language, past work and disciplinary record, adverse impact on the firm's business, and the severity of the offense. Wynns found that plant rules or contract language was the most important standard in these cases (Wynns 1979, 19-22, 27).

Denenberg’s analysis of arbitration awards focused on remedies and treatment for alcoholics and drug addicts. She found differences in the arbitrators’ approaches to substance abusers and identified three schools of thought pertaining to those approaches. One school views substance abuse as a progressive disciplinary problem, while another allows for rehabilitation in some situations. The third school of thought treats substance abuse as a disease to be dealt with through rehabilitation (Denenberg 1980, 17).

In a presentation before the National Academy of Arbitrators, Denenberg addressed many issues related to alcohol, drugs and arbitration. She questioned the wisdom of treating drug abusers differently than their alcohol counterparts and discussed the influence of the legal status
of a drug on the outcome of the arbitration case. While not taking a firm stand on either issue, Denenberg indicates that substance abuse of any kind is a problem requiring medical treatment and rehabilitation (Denenberg 1983, 91, 93).

Marmo documented his research in four different articles (1981, 1982, 1983, 1984-85). He examined 233 arbitration cases related to mental illness, drugs and alcohol. His objective was to analyze the approaches that management, the union, and arbitrators use in the treatment of employees with these problems. The focus was on the outcomes of the arbitration awards rather than the decision cues involved.

Marmo found that management and union leaders are not sure whether their approach to employees with mental, alcohol or drug problems should be one of progressive discipline or rehabilitation. He also found that while the parties may be unwilling to confront these issues, many arbitrators are not. In addition, Marmo found that managers, union leaders and arbitrators are less willing to consider rehabilitation for drug abusers than for alcoholic and mentally ill employees (Marmo 1984-85, 31).

Denenberg and Denenberg (1983) performed a comprehensive qualitative analysis of many issues related to alcohol and drugs in the workplace, and their book consolidates much of their previous work. They analyzed cases and other
information sources, and studied such issues as employee assistance programs, proof and evidence, consistency, clarity and reasonableness of rules.

Denenberg and Denenberg's work differs from the present research in that it was not quantitative and it did not focus specifically on decision cues. Their work is broad in scope and yet important to this study in that it identifies important issues (e.g., disparate treatment of illicit drug users). They offered useful insights into arbitrators' approach to alcohol and drug related cases.

Denenberg and Denenberg found that industrial relations decision-makers seem more resistant to the concept of rehabilitating employees who are drug dependent than they are for those who are addicted to alcohol. They offer several plausible reasons for this inclination. First, alcoholism is a familiar disorder, which industrial relations decision-makers are accustomed to thinking of as a treatable illness. Second, drugs are associated with young people, while managers, union leaders and arbitrators tend to be older and less tolerant of any use of illicit drugs. Third, Denenberg and Denenberg suggest that involvement in illicit drugs carries a "taint" of criminality. This perception may influence industrial relations decision-makers to view drug abuse as a criminal problem rather than a treatable disorder (Denenberg and Denenberg 1983, 18).
In their qualitative study, Coulson and Goldberg studied fifty-nine arbitration cases related to alcohol and drugs. They examined issues related to policies and the collective bargaining agreement, problems of proof, drug and alcohol testing, possession and use of alcohol and drugs on the job, and other related issues. Their study was broad in scope, non-quantitative, and made no extensive examination of decision cues.

Coulson and Goldberg found differences in the way alcohol and drug users are treated. In some situations, employers adopted harsh disciplinary policies for drug users, while condoning the equivalent use of alcohol. However, arbitrators did not always support these policies, as evidenced in cases where arbitrators rejected disparate treatment of marijuana users. This prompted Coulson and Goldberg to wonder if equal treatment of alcohol and drug cases might be the pattern for the future (Coulson and Goldberg 1987, 179).

As previously indicated, researchers have found differences in the treatment of alcohol and illicit drug users in industrial and arbitral contexts, and various reasons for this disparity have been offered. Ben-Yehuda (1986, 1987) offers other plausible explanations for the different treatment of illicit drug users. He asserts that the drug abuse problem is a moral, ideological problem rather than a technical, medical one (1987, 17). Ben-Yehuda
suggests that people are sensitized, through social and political conditioning, to view the illicit drug user as morally corrupt (1987, 17). This conditioned response is manipulated by "moral entrepreneurs"—people or institutions with a value system or moral theme to market (1986, 496). To gain support for their ideas and objectives, moral entrepreneurs create "moral panics." Such panics develop when

a condition, episode, person, or group of persons emerges to become defined as a threat to societal values and interests: its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by the editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved, or (more often) resorted to; the condition then disappears, submerges or deteriorates and becomes more visible (Ben-Yehuda 1986, 496).

Ben-Yehuda (1987, 19) implies that Americans have an acute propensity for moral indignation regarding illicit drugs. Denenberg and Denenberg (1987) also found a curious public tolerance for alcohol, prescription drugs and steroids, but a general intolerance for illicit drugs.

An informal analysis indicates some support for Ben-Yehuda's thoughts. At times, the media, politicians and law enforcement agencies in this country seem to assume the role of moral entrepreneurs. The recently-signed federal drug bill is viewed by some as political pandering to public drug hysteria (Wicker 1988, 27-A). In addition, state and local politicians have called for actions that exploit the
public's emotional response to drug problems. Swanson (1989, 1A, 26A) reports that a Delaware state senator has proposed legislation to use the whipping post in punishing drug dealers, while the police chief of Washington, D.C. has called for inoculating American youths against the effects of drugs. Not to be outdone, a Texas state representative is drafting legislation to punish convicted drug dealers by cutting off their fingers.

In a recent incident, the United States Drug Enforcement Administration staged phony drug seizures to generate false news reports (Associated Press 1988, 22A). This action may have been aimed at maintaining the public's sensitivity to drug problems in hope of generating support for proposed departmental objectives and budget allocations. It has also been suggested that drug and alcohol clinics and their advertising tactics, play on the public's emotional response to chemical dependency (Alsop 1988).

The mass media is in the business of marketing. Consequently, the amount of coverage given an issue is not always in proportion to the seriousness of the problem. Often the public is aroused and titillated by minor issues and bored with major ones. As an example, the New York Times Index of 1987 was analyzed for the amount of alcohol and drug related coverage. Despite the enormity of the social costs related to alcohol use and abuse, the cursory examination reflected a disproportionate amount of news
coverage related to illicit drugs when compared to the coverage of alcohol-related issues.

A recent article by Shafer (1989a) in The Wall Street Journal describes a poll related to illicit drug problems. The poll did not include questions about alcohol or other harmful legal drugs, and Shafer (1989b) concluded that the news-worthiness of illicit drugs over alcohol was the probable explanation. The paradoxical order of public concern and media coverage of illicit drugs has been noted by others.

Alcohol remains the most widely used and abused drug in the United States, despite the recent publicity surrounding the increasing prevalence of cocaine and other illegal drugs. . . . Clearly, alcohol abuse and dependence are problems of major health impact that deserve as much, if not more media, medical and social attention as is currently given to the use of illicit drugs (Metropolitan Life Insurance Company 1987, 20-25).

This research does not attempt to fully explain the reasons for any disparity in the treatment of alcohol and illicit drug users in industrial and arbitral contexts. However, it is an attempt to determine if disparate treatment does actually exist in the cases chosen specifically for this study.

Just Cause

A review of a few discipline cases quickly reveals one dominant theme that guides arbitrators in their decision-making. That theme is "just cause." Even where just cause
is not explicitly identified in the collective bargaining agreement, many arbitrators believe that it is implied (Elkouri 1989, 611; Trotta 1974, 237). Just cause provisos are almost universal elements of the modern collective bargaining agreement (Nelson 1984, 113). According to Zack (1989, 2), arbitrators almost universally apply the standards of just cause in disciplinary cases, regardless of whether the just cause concept is embodied in the collective bargaining agreement or not.

In almost all discipline cases analyzed in this study, arbitrators refer to either "cause," "just cause," "sufficient cause," "justifiable cause," "obvious cause," or something very similar. Essentially, there is no difference in the meaning of these phrases (McGoldrick 1955).

There is no generally accepted standard for defining just cause (Trotta 1974, 236). Platt is frequently cited in support of this statement,

to be sure, no standards exist to aid an arbitrator in finding a conclusive answer to such a question [definition of sufficient cause] and, therefore, perhaps the best he can do is to decide what [a] reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just (Platt 1947, 767).

McPherson (1987, 387) views just cause as an evolving concept, implying that it lacks full definition and continues to be influenced by the work of creative
arbitrators. Despite the definitional problem of just cause, many individuals, over the past forty years, have systematically identified a collection of standards or criteria that guide arbitral judgments in the determination of just cause. The following paragraphs detail a few examples.

Holly conducted a study of arbitrated discharge cases. His two-fold purpose was to examine whether arbitrators upheld or modified the discharge penalties and to identify the criteria important to the arbitrators in the determination of just cause. Holly’s criteria are:

1. Policies must be both known and reasonable.
2. Violation of policies must be proven, and the burden of proof rests on the employer.
3. The application of rules and policies must be consistent: (a) Employees cannot be singled out for discipline. (b) Past practice may be a controlling consideration.
4. Where employees are held to a standard, that standard must be reasonable.
5. The training provided employees must be adequate.
6. The job rights of employees must be protected from arbitrary, capricious, or discriminatory action.
7. Actions must be impersonal and based on fact.
8. Where the contract speaks, it speaks with authority (Holly 1956, 16).
Daugherty's work is possibly the best known attempt to codify the criteria of just cause. His criteria, delineated in Enterprise Wire Company (Daugherty 1966, 363-364) and other cases, have had a profound impact on the thought and decision-making processes of labor arbitrators and industrial relations practitioners (McPherson 1987, 387). No labor arbitration research is complete without reference to the "seven tests" listed below.

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient and safe operation of the company's business, and (b) the performance that the company might expect of the employee?

3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the company's investigation conducted fairly and objectively?

5. At the investigation, did management obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee's service with the company?

Without question, Daugherty's tests are the standard frame of reference for just cause in labor arbitration disciplinary cases. McPherson does not overstate the importance of Daugherty's contribution when he comments:

In more than two decades . . . he has been portrayed in virtually every standard reference as a major, if not the foremost, expositor of just cause. But until one becomes fully aware of the totality of this recognition in the major sources, it is difficult to appreciate the pervasiveness of Daugherty's influence, particularly since the seven tests are often not attributed personally to him in their widespread popular use. No advocate making even a cursory effort to research the meaning of just cause could miss the seven tests, nor could any instructor searching for teaching materials. An arbitrator who wished to apply a recognized set of just cause principles to the facts of a given case could find no more comprehensive, incisive, or widely available interpretation of the meaning of just cause. Even a cursory review of published awards confirms the frequency of their use, albeit often without mention of the source (McPherson 1987, 387).

In their review of discharge and discipline cases, Elkouri and Elkouri examined many of the standards and criteria examined by the arbitrators when determining just cause. The following is a summary listing of these criteria: (1) the effect of the employee's action upon plant
operations, (2) proof of wrongdoing, (3) reasonableness of the penalty, (4) mitigating circumstances, (5) the role of progressive discipline, (6) due process and procedural requirements, (7) timeliness of discipline, (8) the grievant's past record and length of service with the company, (9) knowledge of rules, warnings and consequences, (10) lax enforcement of rules, (11) unequal or discriminatory treatment, and (12) management also at fault (Elkouri and Elkouri 1973, 610-651).

Trotta also identifies many factors important to arbitrators when considering and evaluating just cause. These factors are: (1) degree of severity of the offense, (2) employee's length of service with the company, (3) provocation that may have led to the offense, (4) the number and nature of the employee's previous offenses, (5) company rules that are clear, reasonable and have been communicated to the employee, (6) consistent application of company rules, (7) past disciplinary actions for similar offenses by other employees, (8) employee's pattern of conduct, (9) supervisory practices, and (10) the penalty's reasonableness and appropriateness to the offense (Trotta 1974, 237).

Zack and Bloch identify several management responsibilities and standards in the application of discipline which are important to arbitrators in the evaluation of similar
cases. These standards are: (1) proof that the grievant violated the rule, (2) awareness of company rule, (3) consistency of discipline, (4) relevance to the operation of the enterprise, (5) proper escalation of discipline, (6) corrective, not punitive, discipline, (7) adherence to procedures, (8) laxity in penalizing, (9) timeliness of penalty, (10) appropriateness of penalty, and (11) mitigating circumstances (Zack and Bloch 1979, 14-16).

Collins examined just cause as it relates to the "troubled employee." More specifically, he evaluated arbitrators' determination of just cause in disciplinary cases involving employees with alcohol, drug or mental problems. In his study, Collins (23-25) identified some of the traditional just cause standards. These are reasonableness, notice, nondiscriminatory application, severity of the offense, relevance of the employee's length of service, job-relatedness of the rule, and corrective rather than punitive discipline (Collins 1988, 22-25).

No analysis of just cause would be complete without some treatment of two related concepts and their placement within the just cause context. Invariably, when trying to determine standards or criteria of just cause, one must eventually come to terms with the phrase "arbitrary, capricious and discriminatory" and the concept of "due process." More precisely, it becomes necessary to decide
where they fit with respect to just cause, assuming they fit at all.

There are frequent references in labor arbitration literature to employer actions that are arbitrary, capricious or discriminatory. Invariably, in published disciplinary cases, the union contends that management’s actions are arbitrary, capricious, and discriminatory. Management, of course, contends otherwise. As mentioned previously, Holly identified actions that were arbitrary, capricious and discriminatory as one of the important elements for determining the appropriateness of disciplinary penalties (Holly 1956, 16).

Unfortunately, Holly did not define what arbitrators mean by actions that are arbitrary, capricious and discriminatory. As is the case with just cause, this concept has not been operationally defined. It seems clear, however, that Holly intended it to be an element of just cause rather than the other way around, and certainly not something separate and distinct from just cause.

Daugherty places arbitrary, capricious and discriminatory actions within the framework of just cause.

A no answer to any one or more of the following questions [the seven tests] normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer’s disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of management discretion warranting the arbitrator to
substitute his judgment for that of the employer (Daugherty 1966, 362-363).

In reference to what constitutes just cause, Arbitrator McGoldrick (1955, 6) explains that it "... exclude[s] discharge for mere whim or caprice," thus implying that actions that are arbitrary or capricious are subordinate elements of the concept of just cause. Arbitrator Brecht also fixes arbitrary, capricious and discriminatory actions within the concept of just cause.

Just cause was established by reference to such considerations as fairness, appropriateness of punishment to offense, absence of arbitrariness and capriciousness, consistency of treatment, and absence of haste and emotionalism. The presence of any of these elements, it is felt, properly makes the act of discharge as indefensible and unjust (Brecht 1947, 504).

One-third of the arbitrary, capricious and discriminatory puzzle is relatively easy to classify. A disciplinary action that discriminates between employees based on any reason, whether it is race, union bias or the nature of the substance involved (either alcohol or drugs) represents inconsistency on the part of management. Black (1968, 553) defines discrimination as "In general, a failure to treat all equally; favoritism." Webster views it as a "difference in treatment or favor on a class or categorical basis in disregard of individual merit" (Gove 1981, 648).

Defining the terms arbitrary and capricious is not as straightforward. In fact, the two seem to be synonymous. Arbitrary action is "unrestrained exercise of will, caprice,
or personal preference . . . based on random or convenient selection or choice rather than reason . . . given to willful or irrational choices" (Gove 1981, 110). Black views it as "nonrational; not done or acted according to reason or judgement . . . without fair, solid, and substantial cause" (Black 1968, 134). Action that is capricious is based on "whims or passing fancies, not guided by steady judgement, intent or purpose" (Gove 1981, 333). Apparently, the terms arbitrary and capricious are almost indistinguishable.

Despite the semantic difficulties, arbitrators’ references to actions that are arbitrary, capricious and discriminatory do not pose any great threat to identifying decisional cues. Fortunately, in published awards, arbitrators adequately discuss their evaluations of management decisions that are arbitrary, capricious and discriminatory.

The concept of due process, however, is not as easily placed within the framework of just cause. At times, it appears to relate simply to the discussion of a planned disciplinary action with an employee prior to discharge. At other times, due process is much more complex.

In an unfavorable review of the fourth edition of How Arbitration Works, Bornstein makes the following observations about Elkouri and Elkouri’s treatment of due process:

For example, the short section on Due Process and Procedural Requirements (pp. 673-675) gives no hint that this is a profoundly complex and controversial
subject in the field of discipline. The section begins with this timid and somewhat misleading statement: "Discharge and disciplinary action by management has been reversed where the action violated basic notions of fairness or due process" (p. 673). What are the "basic notions of fairness or due process" in the field of discipline? The authors' answer is a four-paragraph discussion that cites a few dozen cases but fails to deal with fundamental questions. Is discipline defective under the "just cause" standard if management does not listen to an employee's side of the story before imposing discipline? This treatise, in an indirect and confusing way, implies an affirmative answer to that question without exploring its important dynamics (Bornstein 1986, 87).

It seems, at least to Bornstein, that due process is something more than an interview with the employee prior to discharge. However, the implication is that due process, whatever its meaning, is an element of just cause.

Arbitrator Dunn is more precise in the discussion of due process. He identifies some of the elements of due process (e.g., fair and objective investigation and giving the employee his "day in court").

Additionally, it is my judgment that the Company's investigation was not conducted fairly and objectively. Was the Grievant given his "day in court" before the discharge decision was made? Clearly, he was not. The letter of October 5, 1981 states, "This violation was witnessed by a member of management over a period of several minutes and when the employees were confronted they admitted their guilt." This statement is simply not supported by the evidence. The Grievant was not witnessed in possession or use over several minutes. The Grievant never admitted he was guilty. In fact, he was never even asked if he was smoking the joint. In short, the Grievant was denied procedural due process, a basic principle of "just cause," or "proper cause" (Dunn 1982, 1310).
In an article on arbitration awards in discharge cases, the editors of the 1957 Labor Arbitration Reports offer an expanded view of due process.

At least two general principles are common to most, if not all, arbitration cases involving discharges, and these are nothing more or less than ingredients of due process: (1) There must be reasonable rules or standards, consistently applied and enforced and widely disseminated; and the consequences of their violation must be fairly predictable; (2) Management's charges must be supported by substantial evidence, although this requirement may be relaxed if the employee has committed similar transgressions in the past (Bureau of National Affairs 1957, 931).

Employer actions that are arbitrary, capricious and discriminatory, or that lack due process, are not the only issues that confound the process of slotting decision cues within the framework of just cause.

Fortunately, two people have taken much of the guesswork out of this task. Koven and Smith state in the preface to their book Just Cause: The Seven Tests:

A perennial problem intrinsic to all misconduct cases is to establish firmly that the discipline or discharge took place for just cause. To many supervisors, what constitutes "just cause" is a general and elusive concept; to many union representatives, challenging disciplinary action is only a makeshift affair without any theory or plan. This book offers a systematic approach to just cause based on seven key tests and is designed for two purposes: as a resource standing on its own in discipline and discharge, and as a component part of a larger training program (Koven and Smith 1985, XV).

A review of Koven and Smith's book by Yagoda states that, "As a framework for the material, the authors use the seven criteria that arbitrator Carroll R. Daugherty set down
in his award in the matter of Enterprise Wire Co." Yagoda describes the book as a "sweeping overview of the problems and possibilities of the subject [just cause]" (Yagoda 1986, 68).

As an example, Koven and Smith have little difficulty slotting actions that are "arbitrary, capricious and discriminatory" or problems of "due process." They see arbitrary, capricious and discriminatory actions as an element of the test for test number 2, "Reasonable rule or order" and fit due process within the application of test number 3, "Investigation," or test number 5, "Proof." Koven and Smith point out that,

Another way of saying that a rule or work order is unreasonable is to say that it is arbitrary, capricious, or discriminatory, three terms that are closely related in meaning. Broadly speaking, these terms mean simply that a rule has no legitimate business purpose. . . . Both "arbitrary" and "capricious" are also used at times to characterize a rule or order that appears to have stemmed solely from the whim or personal convenience of the employer, with no reference to any business need (Koven and Smith 1985, 90).

Nevertheless, arbitrators with few exceptions have taken the position that the employer must observe certain basic standards of fairness in his dealings with employees--what has been called an "industrial version" of due process or an employee's "industrial civil rights." The basic due process rights to which an employee who is accused of misconduct is entitled include the right to be informed of the charges against him, the right to confront his accusers, the right to present evidence in his own defense and the right to counsel (i.e., to union representation). Some arbitrators would also add to this list the constitutional rights against self-incrimination and unreasonable search and seizure. . . . Due process in disciplinary cases has been discussed in detail by numerous authorities. [Chapter 3] deals solely with the
principal due process issues that come up within the context of Investigation. A remaining due process matter, an employee’s right to be told what he is being accused of, is covered in Chapter 5, "Proof" (Koven and Smith 1985, 159-160).

Koven and Smith identify the relevant questions of just cause as reproduced below.

1. Notice: Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee’s disciplinary conduct?

2. Reasonable Rule or Order: Was the Employer’s rules or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the employer’s business, and (b) the performance that the employer might properly expect of the employee?

3. Investigation: Did the employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Fair Investigation: Was the employer’s investigation conducted fairly and objectively?

5. Proof: At the investigation, did management obtain substantial evidence or proof that the employee was guilty as charged?

6. Equal Treatment: Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Penalty: Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer? (Koven and Smith 1985, 10).

Obviously, just cause is a concept which is not easily categorized. However, based on the literature review, it appears that Koven and Smith do the best job of fitting the concept into a meaningful framework. Accordingly, their model of just cause is used in this research to classify decisional cues.

Quantum of Proof

A final issue related to this study is the question of the quantum of proof. Two questions are relevant: (1) What quantum of proof is required in disciplinary cases involving alcohol and drugs? and (2) Are different standards applied based on whether the involved substance is alcohol or drugs?

According to Hill and Sinicropi, "Quantum of proof is essentially the quantity of proof required to convince a fact finder to resolve or adopt a specific fact or issue in favor of one of the advocates." Quantum of proof is not quantifiable. Hill and Sinicropi also found that "the quantum of proof required by a trier of fact to prefer one party over the other is, of course, a function of the arbitrator. As a result, it is impossible to state when a
requisite degree of belief is established in the mind of a neutral" (Hill and Sinicropi 1980, 10).

When reviewing reading disciplinary arbitration cases, one is quickly introduced to quantum of proof issues. Invariably, the union wants higher standards of proof, while employers want the opposite. The highest standard of proof is beyond a reasonable doubt and the lowest is proof based on a preponderance of the evidence. Proof that is clear and convincing generally occupies a middle ground. Sometimes arbitrators use their own standards and may label them as reasonable proof or evidence that is convincing. In some cases, no standard is indicated by the arbitrator.

A central issue then, relates to these standards as they apply to alcohol and drug cases. Elkouri and Elkouri, while speaking of discharge cases in general, nonetheless characterize what exists in alcohol and drug cases. However, the quantum of required proof in this area is unsettled. In some cases proof beyond a reasonable doubt has been required. But in other cases a lesser degree of proof has been required, such as a preponderance of the evidence, or "clear and convincing" evidence or evidence "sufficient to convince a reasonable mind of guilt" (Elkouri and Elkouri 1973, 621).

Typically, the highest standard of proof is reserved for situations involving moral turpitude. Holly imposed the highest standard where:

Discharge is the supreme penalty that can be placed upon an employee... These counts [theft] are so serious that, if sustained, they place a permanent blot on the employee's record... reflect on the moral character of the employee and, if sustained will brand
him and his family for life. This being true, a
discharge for such alleged offenses requires proof
beyond a reasonable doubt (Holly 1956, 465).

A cursory examination of alcohol and drug cases
indicates that proof beyond a reasonable doubt is used
infrequently. Evidently, highest standard of proof is used
sparingly in other arbitration contexts as well. Theft, as
an example, appears serious enough to warrant the criminal
law standard of beyond a reasonable doubt, yet Talent
reviewed several cases where the equivalent of a crime had
been committed, "but the standard of proof in none of these
cases is proof beyond a reasonable doubt" (Talent 1985,
392).

It remains to be seen what standards of proof are
applied by arbitrators in alcohol and drug discipline cases.
Since there seems to be no previous research related to this
issue, this study examines not only the prevailing standards
of proof, but also analyzes the effect of the legal status
of the drug involved on the quantum of proof applied.
CHAPTER III

METHODOLOGY

This chapter contains details of the research methodology used in the study. It includes a description of the data analyzed, methods for data gathering, the dependent and independent variables, and other variables of interest. The statistical analyses, basic assumptions and potential limitations are also described.

Data Analyzed

Published arbitration awards are available through the Bureau of National Affairs, Commerce Clearing House, Prentice-Hall, the American Arbitration Association and other sources. However, this study analyzed only cases published by the Bureau of National Affairs and Commerce Clearing House. These two sources have traditionally been selected by other researchers, but more importantly, they provide more detail than those of most other publishers. Two hundred forty-nine published arbitration awards related to alcohol and drug disciplinary cases were analyzed. A list of the cases is in the Appendix.

Since no two arbitration cases are alike (Leeper 1989), every attempt was made to select cases with similar circumstances. Primarily, this was done by limiting the study to
cases involving the so called "industrial capital offenses," where the employees' misconduct is so serious that it may be grounds for discharge. These offenses involve use, possession, sale or transfer or being under the influence of alcohol or drugs while on the employers' premises. Typical language of a collective bargaining agreement specifying capital-like offenses and the resultant penalties is indicated in a case heard by Arbitrator Roberts: "An employee may be discharged or suspended without warning for misconduct of any kind, drinking or being under the influence of drugs or alcohol on Company premises of same" (Roberts 1979, 1134).

Three types of cases involving alcohol and drugs were not examined. First, if a case involved insubordination, usually refusing to take a drug test, it was not analyzed. Cases of this nature are more likely to involve issues related to insubordination and rights of refusal rather than alcohol and drug disciplinary issues. There is no reliable way to determine the nature of the substance involved unless, of course, the grievant specifies the type of substance used. Even with the admission of the grievant, there is no assurance that the substance involved is alcohol, rather than a less socially acceptable substance.

Second, cases involving alcohol- or drug-related misconduct off the job were not included in the study. For example, a case involving an employee arrested in the
company parking lot for possession of cocaine would be analyzed, while a case involving the arrest of an employee in a shopping center parking lot for possession of cocaine would not.

An important criterion in off premises decisions is the issue of nexus. An employer must show that the grievant’s action has some real or potential detrimental affect on the employer’s business. For example, nexus could probably be shown if an officer for the Drug Enforcement Agency was arrested on his own time, off work premises, for selling a small amount of marijuana. On the other hand, nexus would be difficult to establish if an employee, in a similar situation, was a plant mechanic in a paper mill.

Third, cases involving absenteeism were not analyzed. Excessive absenteeism is not usually treated as a capital offense, as a result the issues primarily focus on progressive discipline. Additionally, the substance involved, based on a review of cases, is almost exclusively alcohol. This seems reasonable. If a grievant is trying to establish that his substance dependency is a disability, it is probably more prudent to identify a legal substance like alcohol or valium rather than an illicit drug like cocaine or heroin.
Data Gathering

Initially, an elaborate form was used to document important case information. The form was refined and became more manageable as the research progressed. A copy of the final form is provided in the Appendix.

The major challenge of the research was to gather information reliability and enter it correctly into the database. Most of the data gathering was simple and straightforward. For example, identifying the substance involved, the type of discipline taken, the rules violated and what party prevailed required very little skill. However, documenting the reasons the arbitrator used to justify the award required skills which were attained primarily through practice. Since practice was required, the first few cases examined tend to be less reliable than cases examined later.

This threat to reliability was effectively controlled by examining the first seventy-five cases twice. Few errors were found during the second analysis and these were in the first few cases.

The approach to documenting decisional reasons involved two steps. First, the reasons for the decision indicated in the abstract of the award were examined. Second, the text of the arbitrator's opinion and award were analyzed for additional reasons and for elaborations of the reasons cited in the abstract.
In some cases, an examination of the abstract, in isolation, was all that was needed, nothing additional was gained by reading the text. In other cases, more reasons were gleaned from the text of the award. In a very few cases, decisional reasons in the abstract were not mentioned in the text. However, despite some occasional arbitral verbosity and rambling, the reasons for the decision were fairly easy to determine.

Once all cases were examined, two tasks remained. One was largely clerical, the other required some degree of judgment. The judgmental aspect required fitting the reasons cited by the arbitrator into a framework. The framework used was Daugherty's seven tests of just cause identified in Chapter II.

After reviewing a few cases, it became clear that a study of decisional cues in alcohol and drug disciplinary cases is, in effect, a study of the concept of just cause. Additionally, one quickly finds the dominant cue within the concept of just cause. A disciplinary arbitration hearing, like a criminal proceeding, requires proof that the person charged with the offense actually committed the act. Almost without exception, proof of misconduct was an important element in the cases examined.

Fitting the reasons into Daugherty's framework came after the examination of the cases and documentation of data. At that point, after examining over 250 cases, the
skill level to reliably fit the arbitrator’s reasons into Daugherty’s framework had been attained.

Once the reasons were fitted into the seven tests, all of the variables of interest were coded and entered into a Lotus 123 format file. To ensure accuracy, coding and entry were performed twice.

**Dependent Variables**

The study utilized the dependent variables employed in research by Cain and Stahl (1983), Denenberg and Denenberg (1983), Gross (1967), Landis (1977), and Teele (1962). These variables represent the usual range of decisions made by an arbitrator in disciplinary cases: (1) upheld—employers’s disciplinary action was fully sustained, (2) overruled—employer’s disciplinary action was fully rejected, and (3) modified—disciplinary penalty reduced or grievant reinstated with some loss of back pay.

A judgment was made about splits to determine if one party was benefited more than the other. The judgment was made primarily based on the arbitrators’ handling of back pay. An example is the consideration of a situation where a grievant was discharged and the arbitrators’ decision was not issued until twelve months after the discharge. Possible splits include the following three:

1. The grievant is reinstated, the discharge is reduced to a twelve month suspension and there is no
backpay. Although the employer is humbled by reinstatement, there is no "insult to injury" by having to pay the grievant any compensation for time not worked. The union gains some victory by having the grievant rejoin the fold but the victory is empty in a sense, since the grievant is not "made whole." Albeit a somewhat hollow victory, here, the employer "wins" the split.

2. The grievant is reinstated, the twelve-month discharge is reduced to a six months suspension, and the grievant is awarded six months back pay. Here, the decision is an even split.

3. The grievant is reinstated, the twelve month discharge is reduced to a two-week suspension and the grievant is awarded eleven and one-half month's backpay. Clearly, the union gains more than the employer with this decision and wins the split.

Obviously, treatment of splits are judgment calls and are subject to interpretation. To control for subjectivity, in cases involving a modified decision where doubt existed with respect to categorization, awards were determined to be evenly split.

Independent Variables

As mentioned previously, the decision cues, or standards, were identified after all cases were analyzed. Statements from the arbitrators' awards were fitted into

Pulling the cues together and fitting them into a just cause structure requires skill. As mentioned, there is no generally accepted definition of just cause to facilitate the process. There is, however, a body of previous arbitration cases and literature indicating that Daugherty's seven tests are acceptable standards for determining just cause. Daugherty's case, Enterprise Wire Co. where the tests are defined is a landmark case (Yagoda, 67).

Koven and Smith (1984 and 1985) make the task of structuring cues relatively easy. Koven is an experienced arbitrator and is highly respected in the field of labor arbitration. The decision cues, based on Koven and Smith's model, were coded into the analysis based on the scheme below. Examples of typical elements are listed with each cue.

Cue 1. Notice: Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct? (a) Notice of misconduct--what actions can lead to discipline? (b) Notice of penalty--what are the consequences of misconduct? (c) Progressive discipline as notice. (d) Implied notice--misconduct is so serious that formal notice is not required. (e) Negative notice--lack of
enforcement of rules nullifies notice. (f) Last chance or other agreements as notice.

**Cue 2.** Reasonable rule or order: Was the employer’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer’s business, and the performance that the employer might properly expect of the employee? (a) Authority to act—either through the collective bargaining agreement, policy, law, past practice, changed conditions, union acceptance or acquiescence, business necessity. (b) Business necessity—the need for safety, efficiency, and public policy considerations within the employment context. (c) Absence of arbitrariness and capriciousness. (d) Unreasonable application of a reasonable rule (e.g., possession vs. intent; on premises misconduct but off the clock).

**Cue 3.** Investigation: Did the employer, before administering the discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule of order of management? (a) Documentary, physical, and medical evidence obtained and considered before action was taken (e.g., were all witnesses questioned). (b) Action taken was not emotionally driven. (c) Investigation was timely. (d) Due process—employee informed of charges, right to confront accusers, right to present evidence, right to representation. (e) Probable
cause or reasonable cause—did employer have adequate reason to suspect employee (e.g., to administer drug test)?

(f) Search and seizure—proper or improper?

Cue 4. Fair investigation: Was the employer's investigation conducted fairly and objectively?
(a) Employer may act as a prosecutor and judge, but not as a witness during investigation. (b) A higher level manager investigates the incident as an actual third party. (c) There is an absence of the foregone conclusion. (d) The investigation is not based on half measures.

Cue 5. Proof: At the investigation, did management obtain substantial evidence that the employee was guilty as charged? (a) Employer met the appropriate quantum of proof. (b) Evidence proved a fact directly. (c) There is circumstantial evidence of facts from which the fact to be proved can be inferred. (d) Creditability—is the testimony of witnesses believable? (e) Reliability and validity of drug testing procedures and results as issues of proof.

Cue 6. Equal treatment: Has the employer applied rules, orders and penalties even-handedly and without discrimination to all employees? (a) Discrimination for title VII reasons, union membership. (b) Inconsistency with other actions (e.g., more severe action to drug abusers than alcohol abusers). (c) Retaliation by management based on considerations not related to business necessity. (d) "But for" case—for example, employee would not have broken the
rule "but for" the employer's discrimination. (e) Lax enforcement—employer's action discriminates since it took no action against past violators. (f) General inconsistency—employer's reaction to rules requires forecasting by employees.

Cue 7. Penalty: Was the degree of discipline administered by the employer in a particular case reasonably related to the seriousness of the employee's proven offense, and to the record of the employee in his service with the employer? (a) Mitigating circumstances—employee’s tenure, record or personal situation mitigates for or against him. (b) Influence of criminal law. (c) Connection to progressive discipline. (d) Problems associated with cumulative misconduct. (e) Inappropriate in terms of collective bargaining agreement, policies, or other considerations. (f) Timeliness of employer's action (e.g., if action was untimely does it mitigate against severity of the penalty)? (g) Arbitrator lacks authority to modify penalty.

Other Variables

To strengthen the conclusions of the study, other variables are identified and analyzed to determine their effects. A few examples are the type of industry, job category, use of attorneys by the parties, grievant's tenure, use of drug testing, and quantum of proof.
Statistical Analysis

All variables of interest in this study were categorical variables. Logistic regression was used to test the relationships related to decision cues. All other relationships were examined using chi-square tests of independence. Both methods are appropriate for studying categorical variables.

Logistic regression was preferred to ordinary least squares regression due to ordinary least squares' limitations in analyzing categorical variables. Many believe that using ordinary least squares regression in studies of this type may lead to serious errors in inference (Aldrich and Cnudde 1975, 577; Aldrich and Nelson 1984, 9; Fiorina 1981, 213; Fox 1984, 304). According to the Statistix user's manual:

A direct application of multiple regression to proportions is often not satisfactory because the fitted or predicted values may be less than 0 or greater than 1, [which are] impossibilities for proportions. There may be other shortcomings as well. Logistic regression provides a convenient alternative . . . [and] examines the relationship between the logistic transformation of the proportions and linear combinations of the predictor variables. The estimation method is maximum likelihood (Statistix 1986, 5.34).

The balance of the relationships of interest were analyzed using the chi-square statistic. The examination of dominant cues was the only segment of the research in which the intent was to analyze a linear relationship between the dependent variables and the predictor variables. With the
other variables, the purpose was to evaluate possible discrepancies between sets of observed frequencies and sets of expected frequencies. In research of this nature, the chi-square statistic is an appropriate method (Norusis 1988, 242).

**Basic Assumptions**

In analyzing the cases, it was assumed that the arbitrator's decision was not a result of a compromise between the parties. Occasionally, situations develop during hearings that require the arbitrator to abandon the judicial role. The parties to the dispute are sometimes willing to compromise, at which time the arbitrator becomes a mediator rather than a judge. In situations of this nature the resulting award is not the independent decision of the arbitrator. Therefore, published cases of this type were excluded from the study.

It was also assumed that the arbitrators' written opinions contained all the justifications for the award. The review of related literature revealed no indication from others who have examined arbitral decision-making that published arbitration awards are limited in this regard.

**Limitations**

As mentioned, no two arbitration cases are alike. Every attempt was made to provide as much parity between
alcohol and drug cases as possible while conducting the research.

One of the problems associated with research of published information is the so called "file drawer problem." Approximately 4 percent of all labor arbitration awards are published (Gross 1967, 58), leaving the other 96 percent stored away in file drawers. Therefore, a central issue is whether or not published arbitration awards represent all arbitration awards? It is unlikely that unpublished awards are different than published awards, particularly in regard to decision cues. Much of the literature related to decision-making research has been examined, and while others view published vs. unpublished cases as a potential problem, no one has cited research to verify that published cases do not represent all cases.

In discussing the problem, Vegalahn states that, "... this [the problem of published cases not representing all cases] is probably unlikely since the published cases were decided by 35 different arbitrators and involved a cross-section of unions and companies from several different industries" (Vegalahn, 1989, 62). If Vegalahn's reasoning is sound, this study is even more representative. The case analyses also involved a wide cross-section of employers, unions and industries, and involved more different arbitrators, over 170.
There is a potential problem related to clarity in published awards. Some arbitrators are not straightforward in identifying the standards they use in making their decisions. However, a review of over 250 published awards indicates that most arbitrators are clear enough in identifying the bases for their decisions. In addition, previous researchers have not identified clarity as a major problem. There were no cases reviewed in this study in which the arbitrator’s writing style was so cumbersome that the published award could not be included.
CHAPTER IV

PRESENTATION AND ANALYSIS OF THE DATA

The purpose of this chapter is to present and examine the statistical analysis of the data. The chapter is divided into three sections: (1) descriptive data, (2) tests of the hypotheses, and (3) descriptions and analyses of secondary variables of interest.

Descriptive Data

The data were gathered from disciplinary arbitration awards published by the Bureau of National Affairs and Commerce Clearing House. Of the approximately 300 cases examined, 249 were appropriate for this study. There were 170 cases published by the Bureau of National Affairs and 79 cases published by Commerce Clearing House.

The frequency of decisional cues cited by arbitrators is illustrated in Table 1. Data in this table help answer the central question of this research—What are the dominant decision cues? The cues are Daugherty’s seven tests. The three dominant cues are (1) proof of misconduct cited 97.6 percent, (2) proper penalty cited 45 percent, and (3) reasonable action cited 44.4 percent.

LRP Publications provided statistics of labor arbitration awards from January 1980 through May 1989. These
Table 1.—Frequency of decisional cues cited by arbitrators

<table>
<thead>
<tr>
<th>Decisional Cues</th>
<th>Frequency</th>
<th>Percent</th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proper notice</td>
<td>80</td>
<td>32.1</td>
<td>249</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>110</td>
<td>44.2</td>
<td>249</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>58</td>
<td>23.3</td>
<td>249</td>
</tr>
<tr>
<td>Fair investigation</td>
<td>5</td>
<td>2.0</td>
<td>249</td>
</tr>
<tr>
<td>Proof of misconduct</td>
<td>243</td>
<td>97.6</td>
<td>249</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>71</td>
<td>28.5</td>
<td>249</td>
</tr>
<tr>
<td>Proper penalty</td>
<td>107</td>
<td>45.0</td>
<td>249</td>
</tr>
</tbody>
</table>

Statistics are illustrated in Table 2. Management prevails in 51.1 percent of labor arbitration cases. The union wins 30.1 percent of the cases and the remaining 18.8 percent are split between the two parties. In discipline cases, management and the union lose more often, with split decisions occurring more frequently.

Table 3 illustrates the results of a chi-square test of arbitration award information provided by LRP Publications. The test compares outcomes of discipline and non-discipline cases, and indicates that both union and management win
Table 2.—LRP arbitration awards from January 1980 through May 1989

<table>
<thead>
<tr>
<th>Arbitrators' Decision</th>
<th>Discipline Cases</th>
<th></th>
<th>Nondiscipline Cases</th>
<th></th>
<th>Total Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>Percent</td>
<td>No.</td>
<td>Percent</td>
<td>No.</td>
</tr>
<tr>
<td>Management wins</td>
<td>7,928</td>
<td>48.4</td>
<td>12,244</td>
<td>53.0</td>
<td>20,172</td>
</tr>
<tr>
<td>Split decision</td>
<td>4,787</td>
<td>29.3</td>
<td>2,623</td>
<td>11.3</td>
<td>7,410</td>
</tr>
<tr>
<td>Union wins</td>
<td>3,653</td>
<td>22.3</td>
<td>8,242</td>
<td>35.7</td>
<td>11,895</td>
</tr>
<tr>
<td>Total</td>
<td>16,368</td>
<td></td>
<td>23,109</td>
<td></td>
<td>39,477</td>
</tr>
</tbody>
</table>

discipline cases less frequently. Correspondingly, there is a tendency for arbitrators to split awards more frequently in discipline cases. As the chi-square results indicate, these differences are highly significant.

Table 4 illustrates a chi-square test of the discipline cases of this study compared to the LRP discipline cases. In this study, management won 51.8 versus 48.4 percent, the union won at a similar rate, 23.3 versus 22.3 percent, and there were fewer split decisions, 24.9 versus 29.3 percent. However, the pattern was the same for both sets of statistics. Management wins most of the cases, and arbitrators split awards more often than they decide for the union. The low chi-square results indicate that there is essentially no
Table 3.—Chi-Square—LRP statistics, decisions of arbitrators by type of case

<table>
<thead>
<tr>
<th>Decision</th>
<th>Discipline</th>
<th>Non-Discipline</th>
<th>Row Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>Percent</td>
<td>No.</td>
</tr>
<tr>
<td>Management wins</td>
<td>7,928⁵</td>
<td>48.4</td>
<td>12,244</td>
</tr>
<tr>
<td></td>
<td>8,363⁶</td>
<td></td>
<td>11,809</td>
</tr>
<tr>
<td></td>
<td>-435⁷</td>
<td></td>
<td>435</td>
</tr>
<tr>
<td>Split decision</td>
<td>4,787</td>
<td>29.2</td>
<td>2,623</td>
</tr>
<tr>
<td></td>
<td>3,072</td>
<td></td>
<td>4,338</td>
</tr>
<tr>
<td></td>
<td>1,715</td>
<td></td>
<td>-1,715</td>
</tr>
<tr>
<td>Union wins</td>
<td>3,653</td>
<td>22.3</td>
<td>8,242</td>
</tr>
<tr>
<td></td>
<td>4,932</td>
<td></td>
<td>6,963</td>
</tr>
<tr>
<td></td>
<td>-1,279</td>
<td></td>
<td>1,279</td>
</tr>
<tr>
<td>Column total</td>
<td>16,368</td>
<td>41.5</td>
<td>23,109</td>
</tr>
</tbody>
</table>

⁵Absolute frequency.  
⁶Expected frequency.  
⁷Residual.

Chi-Square = 2240.7  
DF = 2  
Significance = .0000

difference between the decisions in the LRP sample and the sample in this study.

An examination of the split decisions in the 249 cases revealed that the cases could be segmented into split decisions favoring management or the union, or into even splits. Table 5 illustrates these findings and indicates that management benefits more often from split decisions than does the union.
Table 4. — Chi-Square—Decisions of arbitrators in discipline cases by LRP data and study data

<table>
<thead>
<tr>
<th>Decision</th>
<th>LRP Data No.</th>
<th>Percent</th>
<th>Study Data No.</th>
<th>Percent</th>
<th>Row Total No.</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management wins</td>
<td>7,799a</td>
<td>48.4</td>
<td>129</td>
<td>51.8</td>
<td>7,928</td>
<td>48.8</td>
</tr>
<tr>
<td></td>
<td>7,807.4b</td>
<td></td>
<td>120.6</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-8.4c</td>
<td></td>
<td>8.4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Split decision</td>
<td>4,725</td>
<td>29.3</td>
<td>62</td>
<td>24.9</td>
<td>4,787</td>
<td>29.3</td>
</tr>
<tr>
<td></td>
<td>4,714.2</td>
<td></td>
<td>72.8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>10.8</td>
<td></td>
<td>-10.8</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Union wins</td>
<td>3,595</td>
<td>22.3</td>
<td>58</td>
<td>24.3</td>
<td>3,653</td>
<td>22.3</td>
</tr>
<tr>
<td></td>
<td>3,597.4</td>
<td></td>
<td>55.6</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>-2.4</td>
<td></td>
<td>2.4</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Column total</td>
<td>16,119</td>
<td>98.5</td>
<td>249</td>
<td>1.5</td>
<td>16,368</td>
<td>100.0</td>
</tr>
</tbody>
</table>

\( ^a \)Absolute frequency.  
\( ^b \)Expected frequency.  
\( ^c \)Residual.  

Chi-Square = 2.327  \( DF = 2 \) Not Significant

Table 6 shows the types of substances involved in the arbitration cases. Despite a higher frequency of alcohol use in this country, most of the cases involved illicit drugs. The legal status of substances and the incidence of drug testing are shown in Table 7.

In most situations, the grievants in this study were charged with either use, possession or being under the influence of an illegal substance. This is shown in Table
Table 5.—Arbitration awards with expanded split decisions

<table>
<thead>
<tr>
<th>Arbitrators' Decision</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management wins</td>
<td>129</td>
<td>51.8</td>
</tr>
<tr>
<td>Split for management</td>
<td>42</td>
<td>16.9</td>
</tr>
<tr>
<td>Split is even</td>
<td>7</td>
<td>2.8</td>
</tr>
<tr>
<td>Split for union</td>
<td>13</td>
<td>5.2</td>
</tr>
<tr>
<td>Union wins</td>
<td>58</td>
<td>23.3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>249</td>
<td>100.0</td>
</tr>
</tbody>
</table>

8. In addition, a large number of grievants were charged with a combination of rule violations.

Table 9 demonstrates the frequency with which grievants deny rule violations. In this study, more than 65 percent of the grievants denied the charges, while more than 20 percent admitted misconduct.

Over 90 percent of the cases examined resulted in discharges. Approximately 5 percent involved suspension from work. This information is illustrated in Table 10.

Almost 85 percent of the grievants were males. Grievants’ tenure ranged from less than one year to over
Table 6.—Type and frequency of substance involved in the cases

<table>
<thead>
<tr>
<th>Substance</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol</td>
<td>85</td>
<td>34.1</td>
</tr>
<tr>
<td>Marijuana</td>
<td>110</td>
<td>44.2</td>
</tr>
<tr>
<td>Cocaine</td>
<td>8</td>
<td>3.2</td>
</tr>
<tr>
<td>PCP</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Quaalude</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td>Valium</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Amphetamines</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Alcohol and legal</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td>Alcohol and illegal</td>
<td>13</td>
<td>5.2</td>
</tr>
<tr>
<td>Multiple illegal</td>
<td>9</td>
<td>3.6</td>
</tr>
<tr>
<td>Legal and illegal</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Unknown</td>
<td>9</td>
<td>3.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

twenty years. Most of the cases involved employees with six to ten years of service. These facts are shown in Table 11. Most of the 249 cases involved employees who were drivers, stationary operators, or workers in all levels of skilled trade positions. The alleged misconduct occurred most frequently in the workers' immediate work areas or in
Table 7.—Legal status of the substance and incidence of drug testing

<table>
<thead>
<tr>
<th>Legality and Testing</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal status</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal</td>
<td>90</td>
<td>36.1</td>
</tr>
<tr>
<td>Illegal</td>
<td>136</td>
<td>54.6</td>
</tr>
<tr>
<td>Not classified</td>
<td>23</td>
<td>9.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

| Drug testing         |           |         |
| No test              | 119       | 47.8    |
| Test given           | 130       | 52.2    |
| **Total**            | **249**   | **100.0** |

other areas on company premises. This information is illustrated in Tables 12 and 13.

In deciding a disciplinary case, arbitrators can select different levels of standards of proof. These are either preponderance of proof, clear and convincing evidence or evidence beyond a doubt. An arbitrator may decide not to indicate any standard. This was true in this study, where
Table 8.—Grievant’s alleged misconduct

<table>
<thead>
<tr>
<th>Rule violated</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use</td>
<td>38</td>
<td>15.3</td>
</tr>
<tr>
<td>Influence</td>
<td>97</td>
<td>39.0</td>
</tr>
<tr>
<td>Sale</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Transfer</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Failed test</td>
<td>8</td>
<td>3.2</td>
</tr>
<tr>
<td>Possession</td>
<td>51</td>
<td>20.5</td>
</tr>
<tr>
<td>Last chance violation</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Transfer and possession</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Use, sale and possession</td>
<td>5</td>
<td>2.0</td>
</tr>
<tr>
<td>Use and influence</td>
<td>8</td>
<td>3.2</td>
</tr>
<tr>
<td>Use, influence and possession</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Use and possession</td>
<td>26</td>
<td>10.4</td>
</tr>
<tr>
<td>Sale and possession</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Influence and possession</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Use and sale</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

arbitrators made no indication of standards of proof in more than 60 percent of the cases. This is shown in Table 14.
Table 9.—Grievant’s position on alleged misconduct

<table>
<thead>
<tr>
<th>Position</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denies allegation</td>
<td>168</td>
<td>67.5</td>
</tr>
<tr>
<td>Admits misconduct</td>
<td>56</td>
<td>22.5</td>
</tr>
<tr>
<td>Admits some culpability</td>
<td>17</td>
<td>6.8</td>
</tr>
<tr>
<td>Not indicated</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Not applicable</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td>Missing</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Table 15 indicates the frequency with which arbitrators cite previous arbitration awards in justifying their decisions. In this study, no reference was made to prior awards in more than 50 percent of the cases.

In 45 percent of the cases studied, arbitration awards were granted within seven to twelve months from the date of the incident. In more than 75 percent of the cases, the award was made in less than twelve months. This information is presented in Table 16.

Tables 17 through 19 illustrate additional variables associated with the study. In approximately 60 percent of the cases, an attorney was present at the hearings. It was
Table 10.—Type of disciplinary action taken by employer

<table>
<thead>
<tr>
<th>Type of Action</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discharge</td>
<td>266</td>
<td>90.8</td>
</tr>
<tr>
<td>Suspension, 1 week or less</td>
<td>14</td>
<td>5.6</td>
</tr>
<tr>
<td>Suspension, more than 1, but less than 4 weeks</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Suspension, 4 weeks or more</td>
<td>2</td>
<td>0.8</td>
</tr>
<tr>
<td>Suspension, unspecified</td>
<td>1</td>
<td>0.4</td>
</tr>
<tr>
<td>Written warning</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

not unusual for management to be the only party represented by legal counsel; however, it was unusual for only the union to be represented. Most of the cases did not involve outside police agencies or in-house undercover operations.

Most cases occurred in manufacturing, production and transportation environments. Cases were most often decided in the South and Midwest, and were presided over by arbitrators who were referred by the Federal Mediation and Conciliation Service. This information is presented in Tables 20 through 22.
Table 11.—Grievants' gender and years of service

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td>29</td>
<td>11.6</td>
</tr>
<tr>
<td>Male</td>
<td>211</td>
<td>84.7</td>
</tr>
<tr>
<td>Mixed</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Missing</td>
<td>6</td>
<td>2.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Years of service</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 1 year</td>
<td>11</td>
<td>4.4</td>
</tr>
<tr>
<td>1 to 3 years</td>
<td>29</td>
<td>11.6</td>
</tr>
<tr>
<td>3 to 6 years</td>
<td>20</td>
<td>8.0</td>
</tr>
<tr>
<td>6 to 10 years</td>
<td>45</td>
<td>18.1</td>
</tr>
<tr>
<td>10 to 15 years</td>
<td>22</td>
<td>8.8</td>
</tr>
<tr>
<td>15 to 20 years</td>
<td>10</td>
<td>4.0</td>
</tr>
<tr>
<td>Over 20 years</td>
<td>6</td>
<td>2.4</td>
</tr>
<tr>
<td>Missing</td>
<td>106</td>
<td>42.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>
Table 12.—Grievant’s job at the time of incident

<table>
<thead>
<tr>
<th>Type</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law enforcement</td>
<td>2</td>
<td>.8</td>
</tr>
<tr>
<td>Driver</td>
<td>30</td>
<td>12.0</td>
</tr>
<tr>
<td>Miner</td>
<td>3</td>
<td>1.2</td>
</tr>
<tr>
<td>Operator, stationary</td>
<td>28</td>
<td>11.2</td>
</tr>
<tr>
<td>Operator, moving</td>
<td>11</td>
<td>4.4</td>
</tr>
<tr>
<td>Trades, all skill levels</td>
<td>65</td>
<td>26.1</td>
</tr>
<tr>
<td>Flight attendant</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Service worker</td>
<td>15</td>
<td>6.0</td>
</tr>
<tr>
<td>Pilot</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Clerical</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Missing</td>
<td>89</td>
<td>35.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.00</strong></td>
</tr>
</tbody>
</table>

Tests of Hypotheses

Logistic regression was used to analyze dependent and independent variables in order to determine dominant decision cues. Chi-square was used to analyze all other relationships in the variables of interest. As mentioned in Chapter III, logistic regression and chi-square are appropriate methods when examining categorical data.
Table 13.—Location of alleged misconduct

<table>
<thead>
<tr>
<th>Area</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work area</td>
<td>113</td>
<td>45.4</td>
</tr>
<tr>
<td>Break or lunch area</td>
<td>23</td>
<td>9.2</td>
</tr>
<tr>
<td>Premises</td>
<td>84</td>
<td>33.7</td>
</tr>
<tr>
<td>Parking lot</td>
<td>6</td>
<td>2.4</td>
</tr>
<tr>
<td>Return from leave</td>
<td>8</td>
<td>3.2</td>
</tr>
<tr>
<td>Reporting to work</td>
<td>8</td>
<td>3.2</td>
</tr>
<tr>
<td>Missing</td>
<td>7</td>
<td>2.8</td>
</tr>
</tbody>
</table>

Total                  | 249       | 100.0   

Table 14.—Standards of proof applied

<table>
<thead>
<tr>
<th>Standard</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not indicated</td>
<td>160</td>
<td>64.3</td>
</tr>
<tr>
<td>Preponderance</td>
<td>28</td>
<td>11.2</td>
</tr>
<tr>
<td>Clear and convincing</td>
<td>41</td>
<td>16.5</td>
</tr>
<tr>
<td>Beyond a doubt</td>
<td>7</td>
<td>2.8</td>
</tr>
<tr>
<td>Missing</td>
<td>13</td>
<td>5.2</td>
</tr>
</tbody>
</table>

Total                  | 249       | 100.0   |
Hypothesis one stated: The dominant decision cues for arbitral decision-making will be those traditionally relied upon by arbitrators in disciplinary cases. These cues are
Table 17.—Legal representation at hearing

<table>
<thead>
<tr>
<th>Representation</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>65</td>
<td>26.1</td>
</tr>
<tr>
<td>Management only</td>
<td>69</td>
<td>27.7</td>
</tr>
<tr>
<td>Union only</td>
<td>13</td>
<td>5.2</td>
</tr>
<tr>
<td>Both parties</td>
<td>82</td>
<td>32.9</td>
</tr>
<tr>
<td>Missing</td>
<td>20</td>
<td>8.0</td>
</tr>
</tbody>
</table>

Total 249 100.00

Table 18.—Police involvement with incident

<table>
<thead>
<tr>
<th>Degree of Involvement</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>No police action</td>
<td>211</td>
<td>84.7</td>
</tr>
<tr>
<td>Investigation only</td>
<td>15</td>
<td>6.0</td>
</tr>
<tr>
<td>Grievant arrested</td>
<td>21</td>
<td>8.4</td>
</tr>
<tr>
<td>Missing</td>
<td>2</td>
<td>.8</td>
</tr>
</tbody>
</table>

Total 249 100.00

the seven tests of just cause: proper notification of rules and consequences, the reasonableness of management’s action, proper investigation, fair investigation, proof of
misconduct, equal treatment and the appropriateness of the penalty.

Affirmation of this hypothesis appears in Table 1. Of the 249 cases examined, none of the criteria relied upon by arbitrators in making awards was outside the framework of just cause as defined by Daugherty's (1966) seven tests, as elaborated and clarified by the works of Koven and Smith (1984 and 1985). Based on frequencies and percentages, the tests are ranked as follows: (1) proof of misconduct is cited in 97.6 percent of the cases, (2) the appropriateness of the penalty is cited in 45 percent of the cases, (3) the reasonableness of management’s action is cited in 44.2 percent of the cases, (4) proper notice is cited in 32.1 percent, (5) equal treatment is cited in 28.5 percent,
Table 20.—Type of industry

<table>
<thead>
<tr>
<th>Type</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manufacturing/production</td>
<td>116</td>
<td>46.6</td>
</tr>
<tr>
<td>Transportation</td>
<td>29</td>
<td>11.6</td>
</tr>
<tr>
<td>Mining</td>
<td>10</td>
<td>4.0</td>
</tr>
<tr>
<td>Education</td>
<td>1</td>
<td>.4</td>
</tr>
<tr>
<td>Government</td>
<td>14</td>
<td>5.6</td>
</tr>
<tr>
<td>Construction</td>
<td>5</td>
<td>2.0</td>
</tr>
<tr>
<td>Services</td>
<td>14</td>
<td>5.6</td>
</tr>
<tr>
<td>Utilities</td>
<td>8</td>
<td>3.2</td>
</tr>
<tr>
<td>Retail</td>
<td>9</td>
<td>3.6</td>
</tr>
<tr>
<td>Health</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Missing</td>
<td>39</td>
<td>15.7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

(6) proper investigation is cited in 23.3 percent, and (7) fair investigation is cited in only 2 percent of the cases.

Scenarios were developed to further examine the relative importance of each cue. With seven independent variables (six with three categories and one containing four), the possible scenarios are seemingly endless. For example, if proof of misconduct as a determinant of management's odds of winning is examined, four scenarios could be
Table 21.—Region of the country

<table>
<thead>
<tr>
<th>Region</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Northeast</td>
<td>14</td>
<td>5.6</td>
</tr>
<tr>
<td>Midwest</td>
<td>60</td>
<td>24.1</td>
</tr>
<tr>
<td>South</td>
<td>67</td>
<td>26.9</td>
</tr>
<tr>
<td>Central</td>
<td>18</td>
<td>7.2</td>
</tr>
<tr>
<td>West</td>
<td>38</td>
<td>15.3</td>
</tr>
<tr>
<td>Missing</td>
<td>52</td>
<td>20.9</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Table 22.—Arbitrator referring agency

<table>
<thead>
<tr>
<th>Agency</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not indicated</td>
<td>94</td>
<td>37.8</td>
</tr>
<tr>
<td>American Arbitration Association</td>
<td>13</td>
<td>5.2</td>
</tr>
<tr>
<td>Federal Mediation and Conciliation Service</td>
<td>136</td>
<td>54.6</td>
</tr>
<tr>
<td>Missing</td>
<td>6</td>
<td>2.4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>249</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>
developed: (1) proof is not mentioned by the arbitrator, or (2) the arbitrator finds that misconduct is proven, or (3) the arbitrator finds that misconduct is not proven, or (4) the arbitrator finds evidence of some misconduct by the grievant.

To keep the analyses manageable and in the proper perspective, seven scenarios were selected. The scenarios examine the odds of a management or union win, or a split decision at arbitration based on the applications of Daugherty’s seven tests. Once the scenarios were established, a logistic regression was performed to examine the relationships. After several iterations, an error message indicated that one independent variable, fair investigation, was highly correlated with one or more of the other predictor variables. Consequently, this variable was eliminated from the analyses. As seen in Table 1, fair investigation was cited only five times by arbitrators. With a dummy variable coding of zero for its absence if it is not cited as a decision cue, fair investigation would obviously correlate highly with many of the variables. Furthermore, due to its low frequency and corresponding lack of predictive value, no harm was done in dropping it from the analyses. The findings of the logistic regression examination of hypothesis one were as follows:

Scenario 1. What are the odds of management winning if all seven tests are met by management? This scenario helped
answer the primary question of this research—What are the dominant decision cues? The results of this scenario are illustrated in Table 23. There are two dominant cues when management wins in arbitration. Proof of misconduct, as expected, is overwhelmingly important. Assuming that misconduct is proven, the odds are 149 to 1 that management will win. The appropriateness of the penalty is very important as well. If management demonstrates that the penalty is reasonable, the odds are 93 to 1 in their favor. All coefficients are significant with the exception of equal treatment.

**Scenario 2.** What are the odds of the union winning if all seven tests are met by management? The results of this scenario are illustrated in Table 24. The odds of a union win if management meets the tests of just cause are low. While most of the coefficients are not significant, proof of misconduct is extremely important. The chances of a union win when management proves misconduct are very remote.

**Scenario 3.** What are the odds of a split decision if all seven tests are met by management? The results of this scenario are illustrated in Table 25. The odds against a split decision are generally consistent across the variables, although the results for proper investigation and equal treatment are not significant. However, the odds slightly favor a split decision even though management proves misconduct.
Table 23.—Logistic regression of arbitrators' awards for management with the seven tests of just cause as predictor variables

<table>
<thead>
<tr>
<th>Predictor Variable</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-5.6265</td>
<td>.0000</td>
<td>.004:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>1.2837</td>
<td>.0437</td>
<td>3.61:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>1.5036</td>
<td>.0094</td>
<td>4.50:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>3.3017</td>
<td>.0154</td>
<td>27.16:1</td>
</tr>
<tr>
<td>Proven misconduct</td>
<td>5.0089</td>
<td>.0001</td>
<td>150:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>1.2010</td>
<td>.1576</td>
<td>3.32:1</td>
</tr>
<tr>
<td>Proper penalty</td>
<td>4.5326</td>
<td>.0043</td>
<td>93:1</td>
</tr>
</tbody>
</table>

Deviance = 108.6  DF = 241  P value = 1.0000

Scenario 4. What are the odds of management winning if all tests are met, but the penalty is excessive? The results of this scenario are illustrated in Table 26. In this case, the odds of a decision for management are decreased substantially. This finding is significant at the .0019 level.

Scenario 5. What are the odds of management winning if all tests are met, but misconduct is not proven and the penalty is excessive? The results of this scenario are
Table 24. Logistic regression of arbitrators' awards for union with the seven tests of just cause as predictor variables

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>.80420</td>
<td>.0014</td>
<td>2.23:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>.57333</td>
<td>.5582</td>
<td>1.77:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>-.46031</td>
<td>.6655</td>
<td>.63:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>-.97647</td>
<td>.7050</td>
<td>.00006:1</td>
</tr>
<tr>
<td>Proven misconduct</td>
<td>-.40437</td>
<td>.0000</td>
<td>.02:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>-.67183</td>
<td>.6648</td>
<td>.51:1</td>
</tr>
<tr>
<td>Proper penalty</td>
<td>-8.6156</td>
<td>.7088</td>
<td>.0002:1</td>
</tr>
</tbody>
</table>

Deviance = 121.6  DF = 241  P value = 1.0000

illustrated in Table 27. A scenario involving unproven misconduct and excessive penalty is particularly unfavorable for management. The odds of management winning the decision in this scenario are .00001 to 1 assuming misconduct, and .003 to 1 assuming an excessive penalty. While results are not significant for the misconduct cue, the result for the excessive penalty cue is significant at the .0009 level.

Scenario 6. What are the odds of management winning if all tests are met and management can prove some, but not
Table 25.--Logistic regression of arbitrators’ awards for split decisions with the seven tests of just cause as predictor variables

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-.56397</td>
<td>.0181</td>
<td>.57:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>-1.2666</td>
<td>.0397</td>
<td>.28:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>-1.7536</td>
<td>.0025</td>
<td>.17:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>-.46789</td>
<td>.4598</td>
<td>.63:1</td>
</tr>
<tr>
<td>Proven misconduct</td>
<td>.82546</td>
<td>.0258</td>
<td>2.28:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>-1.0876</td>
<td>.1926</td>
<td>.34:1</td>
</tr>
<tr>
<td>Proper penalty</td>
<td>-2.8499</td>
<td>.0057</td>
<td>.06:1</td>
</tr>
</tbody>
</table>

Deviance = 217.4      DF = 241      P value = .8598

all, misconduct? The scenario represented in Table 28 is a modification of scenario 5. The variables remain the same with the exception of misconduct, which is altered to reflect a scenario when some misconduct is proven. The results are slightly altered in management’s favor. The odds are .00006 to 1 (non-significant) with some misconduct proven, and .003 to 1 (significant) with an excessive penalty.
Table 26.—Logistic regression of arbitrators’ awards for management with the seven tests of just cause as predictor variables where the penalty was excessive

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-4.7080</td>
<td>.0000</td>
<td>.009:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>.79897</td>
<td>.2533</td>
<td>2.22:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>2.0761</td>
<td>.0071</td>
<td>7.97:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>3.1400</td>
<td>.0237</td>
<td>23.10:1</td>
</tr>
<tr>
<td>Proven misconduct</td>
<td>5.4661</td>
<td>.0000</td>
<td>236.54:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>1.3552</td>
<td>.2083</td>
<td>3.88:1</td>
</tr>
<tr>
<td>Excessive penalty</td>
<td>-6.4284</td>
<td>.0019</td>
<td>.002:1</td>
</tr>
</tbody>
</table>

Deviance = 85.91            DF = 241            P value = 1.0000

Scenario 7. What are the odds of a split decision if management can prove some, but not all, misconduct? As seen in Table 29, the predictor variables are maintained at the same levels, while the dependent variable is changed from a management win to a split decision. As a result, there is a very high probability of a split decision when some misconduct is proven and the penalty is excessive. The odds for a split decision with proof of some misconduct are 53423 to 1
Table 27.—Logistic regression of arbitrators' awards for management with the seven tests of just cause as predictor variables where misconduct was unproven and the penalty was excessive

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>- .12148</td>
<td>.6638</td>
<td>.89:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>1.5737</td>
<td>.0257</td>
<td>4.82:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>2.9067</td>
<td>.0002</td>
<td>18.30:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>.89448</td>
<td>.2196</td>
<td>2.45:1</td>
</tr>
<tr>
<td>Unproven misconduct</td>
<td>-11.262</td>
<td>.4233</td>
<td>.00001:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>1.9628</td>
<td>.0897</td>
<td>7.12:1</td>
</tr>
<tr>
<td>Excessive penalty</td>
<td>- 5.9648</td>
<td>.0009</td>
<td>.003:1</td>
</tr>
</tbody>
</table>

Deviance = 110.3  DF = 241  P value = 1.0000

(non-significant) and 15.57 to 1 (significant) when the penalty is excessive.

Hypothesis two stated: The dominant decision cues for arbitral decision-making will not be significantly different in alcohol-related cases and drug-related cases.

This hypothesis was tested through seven chi-square examinations. Each chi-square analyzed one of Daugherty's seven tests as a row variable and the legal status of the
Table 28.—Logistic regression of arbitrators' awards for management with the seven tests of just cause as predictor variables when some misconduct is proven and the penalty is excessive

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>- .71047</td>
<td>.0037</td>
<td>.49:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>1.2683</td>
<td>.0234</td>
<td>3.55:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>2.9202</td>
<td>.0000</td>
<td>18.54:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>2.6269</td>
<td>.0187</td>
<td>13.83:1</td>
</tr>
<tr>
<td>Some misconduct</td>
<td>-9.7425</td>
<td>.5875</td>
<td>.00006:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>1.7038</td>
<td>.0441</td>
<td>5.49:1</td>
</tr>
<tr>
<td>Excessive penalty</td>
<td>-5.9783</td>
<td>.0052</td>
<td>.003:1</td>
</tr>
</tbody>
</table>

Deviance = 145.1  DF = 241  P value = 1.0000

substance as a predictor variable. The seven chi-square tests are summarized in Table 30. One decision cue, equal treatment, varied significantly based on the legal status of the substance. Data in Table 31 illustrate the differences in equal treatment and indicate that arbitrators find management to be less discriminatory than expected in the treatment of grievants who are involved in illicit drugs.

Hypothesis three stated: There will be consistency among arbitrators regarding the selection of decision cues.
Table 29.—Logistic regression of arbitrators' awards for split decisions with the seven tests of just cause as predictor variables when some misconduct is proven and the penalty is excessive

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Coefficient</th>
<th>P Values</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-2.0750</td>
<td>.0000</td>
<td>.13:1</td>
</tr>
<tr>
<td>Proper notice</td>
<td>-.31350</td>
<td>.6398</td>
<td>.73:1</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>-.72487</td>
<td>.2228</td>
<td>.48:1</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>-.90672</td>
<td>.4088</td>
<td>.40:1</td>
</tr>
<tr>
<td>Some misconduct</td>
<td>10.886</td>
<td>.3546</td>
<td>53423:1</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>-.52672</td>
<td>.5501</td>
<td>.59:1</td>
</tr>
<tr>
<td>Excessive penalty</td>
<td>2.7453</td>
<td>.0000</td>
<td>15.57:1</td>
</tr>
</tbody>
</table>

Deviance = 133.8  DF = 241  P value = 1.0000

This hypothesis is confirmed quantitatively by data in Table 1 and qualitatively based on the examination of the 249 cases. It is clear that proof is the consistent dominant cue. Reasonableness of management's action and the appropriateness of the penalty are frequently cited. Fairness of management's investigation, however, is consistently omitted as a decision cue. The scenarios described in Tables 23 through 29 provide further statistical evidence of the consistencies in the choices of arbitral decision cues.
<table>
<thead>
<tr>
<th>Decision Cue</th>
<th>Number of Cases</th>
<th>Chi-Square Statistic</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proper notice</td>
<td>68</td>
<td>2.5789</td>
<td>.1083</td>
</tr>
<tr>
<td>Reasonable action</td>
<td>93</td>
<td>.3111</td>
<td>.5770</td>
</tr>
<tr>
<td>Proper investigation</td>
<td>53</td>
<td>1.4999</td>
<td>.2207</td>
</tr>
<tr>
<td>Fair investigation&lt;sup&gt;a&lt;/sup&gt;</td>
<td>4</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Proof of misconduct</td>
<td>220</td>
<td>.9076</td>
<td>.6352</td>
</tr>
<tr>
<td>Equal treatment</td>
<td>68</td>
<td>4.1976</td>
<td>.0405&lt;sup&gt;b&lt;/sup&gt;</td>
</tr>
<tr>
<td>Proper penalty</td>
<td>99</td>
<td>1.1572</td>
<td>.2820</td>
</tr>
</tbody>
</table>

<sup>a</sup>Would not run due to small number of cases.  
<sup>b</sup>Statistically significant.

Arbitrators are particularly consistent in one area; unless management proves full misconduct, they do not prevail in arbitration.

Data in Table 30 also support Hypothesis three. Chi-square tests were performed with the seven tests as dependent variables and the legal status of the drug as predictor variables. With the exception of equal treatment, there were no differences, indicating consistency for most of the seven tests.
A review of published awards supports Hypothesis three. Whether identified by the arbitrator or not, Daugherty’s seven tests are the established standard for rulings in disciplinary cases. While arbitrators rarely cited all seven tests in a case, there were no cases in which the reasoning for the arbitrator’s award did not fit into at least one of Daugherty’s tests.

Hypothesis four stated: Grievants in alcohol-related cases will tend to receive more favorable arbitral awards than grievants in drug-related cases. This hypothesis was confirmed. Table 32 illustrates a chi-square analysis of
Table 32.—Decision of the arbitrator by the legal status of the substance

<table>
<thead>
<tr>
<th>Decision</th>
<th>Legal Substance</th>
<th>Illegal Substance</th>
<th>Row Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No.</td>
<td>Percent</td>
<td>No.</td>
</tr>
<tr>
<td>Management wins</td>
<td>39a</td>
<td>43.3</td>
<td>73</td>
</tr>
<tr>
<td></td>
<td>44.6b</td>
<td></td>
<td>67.4</td>
</tr>
<tr>
<td></td>
<td>-5.6c</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Split decision</td>
<td>32</td>
<td>35.6</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>23.5</td>
<td></td>
<td>35.5</td>
</tr>
<tr>
<td>Union wins</td>
<td>19</td>
<td>21.1</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>21.9</td>
<td></td>
<td>33.1</td>
</tr>
<tr>
<td>Column total</td>
<td>90</td>
<td>39.8</td>
<td>136</td>
</tr>
</tbody>
</table>

aAbsolute frequency.  
bExpected frequency.  
cResidual.

Chi-Square = 6.92371  DF = 2  Significance = .0314

the arbitrators' decisions by the legal status of the substance. If the grievant used an illegal substance, management wins more often and there are significantly fewer split decisions. With fewer splits, a grievant using an illegal substance is less likely to be reinstated than a grievant using a legal substance. Although the union wins more often than expected, that likelihood is not as great as the probability of a management win or an absence of a reinstatement in a split decision.
In the scenario represented in Table 31, arbitrators find that management treats the illegal drug user more equally than expected. This is another indication that the arbitrator views management's treatment of illegal drug users more favorably than the treatment of legal drug users.

A chi-square was performed to determine the influence of drug testing. Table 33 illustrates a chi-square analysis of the decision of the arbitrators by the legal status of the substance when controlling for the presence or absence of drug testing. There was no significant difference in decision outcomes when controlling for drug testing.

<table>
<thead>
<tr>
<th>Drug Test</th>
<th>Chi-Square</th>
<th>Degrees of Freedom</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>No drug test given</td>
<td>4.08067</td>
<td>2</td>
<td>.1300</td>
</tr>
<tr>
<td>Drug test given</td>
<td>1.02603</td>
<td>2</td>
<td>.5987</td>
</tr>
</tbody>
</table>

Hypothesis five stated: Based on an examination of published awards only, differences in the treatment of grievants in alcohol-related cases compared to the treatment received by grievants in drug-related cases cannot be
explained in terms of the intent of the parties, as embodied in the collective bargaining agreement, or by past practice.

This hypothesis was confirmed qualitatively. Of the 249 cases examined, there was no indication that a disparate treatment of illicit drug users was sanctioned by the collective bargaining agreement. To the contrary, in a few cases, the fact that illegal drug users were treated differently than alcohol users was sufficient reason for arbitrators to rule against management.

Other Variables of Interest

Additional variables accumulated in this study were used as predictor variables in chi-square tests of the arbitrators' decisions. The results of the tests are illustrated in Table 34. Six predictor variables were significant. These were (1) the type of discipline administered, (2) the degree of legal representation at the hearing, (3) the location of the misconduct, (4) the grievant's position on the accusation, (5) the agency referring the arbitrator, and (6) the quantum of proof relied upon by the arbitrator.

The type of discipline was either discharge or suspension. The chi-square analysis indicates that the union won less often when the discipline was discharge rather than suspension. However, these results should be viewed with
Table 34.—Chi-square tests of the decision of the arbitrator as the dependent variable

<table>
<thead>
<tr>
<th>Predictor Variables</th>
<th>Chi-square Statistic</th>
<th>Degrees of Freedom</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug test</td>
<td>4.24591</td>
<td>2</td>
<td>.1197</td>
</tr>
<tr>
<td>Rule violated</td>
<td>32.08686</td>
<td>28</td>
<td>.2710</td>
</tr>
<tr>
<td>Gender</td>
<td>1.31769</td>
<td>2</td>
<td>.5174</td>
</tr>
<tr>
<td>Type of discipline</td>
<td>8.37082</td>
<td>2</td>
<td>.0152\text{a}</td>
</tr>
<tr>
<td>Legal representation</td>
<td>17.40862</td>
<td>6</td>
<td>.0079\text{a}</td>
</tr>
<tr>
<td>Police involved</td>
<td>6.47072</td>
<td>4</td>
<td>.1666</td>
</tr>
<tr>
<td>Undercover operation</td>
<td>4.92107</td>
<td>2</td>
<td>.0854</td>
</tr>
<tr>
<td>Industry type</td>
<td>19.52566</td>
<td>18</td>
<td>.3601</td>
</tr>
<tr>
<td>Tenure</td>
<td>10.66351</td>
<td>12</td>
<td>.5578</td>
</tr>
<tr>
<td>Job type</td>
<td>9.88503</td>
<td>18</td>
<td>.9356</td>
</tr>
<tr>
<td>Location of rule violation</td>
<td>20.25780</td>
<td>10</td>
<td>.0269\text{a}</td>
</tr>
<tr>
<td>Region of country</td>
<td>7.05736</td>
<td>8</td>
<td>.5305</td>
</tr>
<tr>
<td>Time from incident to award</td>
<td>46.63830</td>
<td>46</td>
<td>.4460</td>
</tr>
<tr>
<td>Grievant’s plea</td>
<td>19.14303</td>
<td>4</td>
<td>.0007\text{a}</td>
</tr>
<tr>
<td>Referral agency</td>
<td>7.82693</td>
<td>2</td>
<td>.0200\text{a}</td>
</tr>
<tr>
<td>Quantum of proof—dichotomy</td>
<td>6.58328</td>
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\text{a}Significant.
caution, since only 18 of the 249 cases studied involved suspensions.

There were four possible categories of legal representation at the hearings: (1) neither party was represented by an attorney, (2) both parties were represented by attorneys, (3) only management was represented by an attorney, or (4) only the union was represented by an attorney. Management won less often when neither party had an attorney or when only the union had representation. If both parties were represented, management won even fewer decisions. However, if management was represented and the union was not, management was the more frequent winner.

The grievant’s misconduct occurred in one of five locations: (1) in the immediate work area, (2) in a break or lunch area, (3) on the employer’s parking lot, (4) on the company premises, or (5) upon returning to work from a lay-off or leave of absence. Management won less often if the misconduct took place in break or lunch areas, but won more often when the misconduct occurred on company premises.

The grievant may admit or deny all allegations of the misconduct or may admit to only part of the accusation. If the grievant denied all allegations, the likelihood of a union win was significantly greater. If the grievant admitted to all allegations, the number of split decisions increased significantly. If there was some, but not total
admission of misconduct, management was favored more often in the awards.

The arbitrators were selected by the parties from panels provided by the Federal Mediation and Conciliation Services or by the American Arbitration Association. Management won more often with arbitrators referred by the American Arbitration Association. These results should be viewed with caution, however, since the residuals are small, and only 13 of the 249 cases studied involved arbitrators who were referred by the American Arbitration Association.

An arbitrator may or may not cite a standard of proof. In cases where the arbitrator indicated a standard, the union won more often than in cases where no standard was specified by the arbitrator. This may be due to a felt need of the arbitrator to establish a standard when management does not prove misconduct. A chi-square test to determine if any one standard—preponderance of evidence, clear and convincing evidence, or evidence beyond a doubt—impacted the arbitrators' decisions more than the other two, revealed no significant differences.
CHAPTER V

DISCUSSION OF FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

The primary purpose of this study was to define dominant decision cues in labor arbitration disciplinary cases and to determine if arbitrators favor legal drug users over illegal drug users. The secondary purpose was to analyze other variables associated with arbitrators' decisions and to determine if those factors influenced the decisions.

Published arbitration awards provided the source of data for the study. Over 300 cases were analyzed, 249 of which were relevant to the study. Twenty variables were coded and analyzed using logistic regression and chi-square statistical methods.

Discussion of Findings

Arbitrators decide disciplinary cases primarily on the bases of "just cause." The concept of just cause is not operationalized and arbitrators are free to use their own standards for defining just cause. However, there seemed to be a consistent approach on the part of arbitrators when establishing whether management acted properly, or with cause, when taking disciplinary action against an employee.
It was hypothesized that arbitrators would rely on traditional criteria when deciding alcohol- and drug-related disciplinary cases. The research revealed that arbitrators were consistent in relying on the criteria from Daugherty's (1966) seven tests of just cause. During the examination of published awards, no cases were found in which an arbitrator's justification for the award did not fit into Daugherty's framework.

Arbitrators did not always cite all seven tests. The extent to which an arbitrator cited the seven tests may have been a matter of personal preference. However, it seemed to be partly dependent upon the ultimate outcome of the decision, particularly as it relates to the proof of misconduct criterion.

Proof of misconduct was the dominant cue among the seven tests. In 95 percent of the cases, proof of misconduct was cited by the arbitrators. The central theme of any disciplinary case is the grievant's culpability and management's ability to prove misconduct. In that respect, arbitration cases are no different than criminal proceedings, wherein proof of guilt must be established for a conviction.

Assuming an arbitrator found a lack of proof of misconduct, there was a reasonable tendency for arbitrators to cite fewer of the seven tests. If management could not prove misconduct, there was no practical reason to discuss
any of the other issues. However, few arbitrators were willing to end an award on a single note. Arbitrators were not totally apolitical in the award process when management was credited with meeting some of the seven tests but failed to meet the most important test—proof.

Arbitrators were, however, articulate in discussing criteria when misconduct was proven. Assuming misconduct was established, the arbitrators predictably considered the appropriateness of the penalty, the reasonableness of management's actions, the grievants' knowledge of the violated rules, and the consequences of breaking the rule. Arbitrators then considered whether or not management had properly investigated the incident, and whether the grievant was treated consistently with others in similar circumstances.

It was unusual for arbitrators to cite all seven tests and to work through a case completely anchored to Daugherty's framework. A notable exception was Fox (1983) in the Misco case, which was ultimately settled by the Supreme Court. Perhaps Fox sensed the ultimate destiny of the award and felt he needed a respected reference for the case. Fox not only cited Daugherty's case and dealt with each test, he "graded" management on each of the seven issues. When Daugherty framed the seven tests, he set the standard for management to "pass" the tests. Each test was presented as a question which had to be answered with a "yes." Fox used
terms of "no" or "weak no" when management failed in answering the various tests.

The infrequency of references to the test for "fair investigation" was puzzling. Possible plausible explanations include the difficulty of evaluating whether management was fair or not. Koven and Smith's elaboration of Daugherty's fourth test examined the complicated task of evaluating fairness:

What [fair investigation] adds up to is this: For an investigation to be successful (from the point of view of both proof and due process), it must be objective. For it to be objective, someone from management must make sure that as much available evidence as possible is collected and that evidence gets a careful look, not from a partisan, management-oriented perspective, but from the perspective of a disinterested third party. And for a disinterested evaluation to be conducted, some management official rather than the supervisor who imposed discipline is generally required (Koven and Smith 1985, 192).

Proof of misconduct was easily evaluated by the arbitrators. Management provided either direct evidence that the arbitrator could see and touch, or creditable evidence by testimony of witnesses. It is not easy to evaluate a fair investigation according to this definition. In effect, the arbitrator had to decide if the management-level employee who coordinated the investigation acted as a detached, disinterested third party. These are lofty ideals which assume that managers can divorce themselves from their traditional mission of profit maximization and corporate representation. This test may be systematically avoided by
arbitrators for two reasons. It may be impractical to expect management to be a "disinterested third party" and, if so, it may be too abstract to evaluate. Koven and Smith (1985, 195) described part of the problem for management as one of "my supervisor, right or wrong." Not infrequently, a disciplinary decision is made by a supervisor before any member of management has had an opportunity to conduct an investigation. Often, the action places management in a position of "rubber stamping" the action. Arbitrator Seitz described it this way:

Not infrequently, an employee is discharged because a supervisor has used bad judgment or because a personnel decision was made in haste or in the heat of controversy. Tribal loyalty then encourages the employer to support a questionable initial decision through the grievance steps and in arbitration, even though second thoughts, more careful consideration, and later developed facts indicate that [supervision] would be more just, fair and consistent [with past practice] (Seitz 1980, 28).

From personal experience, it seems that "tribal loyalty" has a pervasive influence on many managers. Arbitrators may realize this along with the difficulty of evaluating the investigating manager's disinterest and may avoid comment on the issue altogether.

Another plausible explanation may be found in the subtleties of the arbitrators' thoughts and written discussions. Arbitrators are not bound by, nor do they typically "run down the list" of, Daugherty's seven tests. It is possible that arbitrators see little difference between a
proper investigation and a fair investigation. Accordingly, when an arbitrator comments that management’s investigation was appropriate, he could actually mean that the investigation was both "fair and proper."

Management wins arbitration cases more often than do unions. This was true in this study and is also true for disciplinary arbitration cases in general. Disciplinary case statistics provided by LRP Publications indicate that management won 48.4 percent of the cases, the union won 22.3 percent of the cases, and a split decision occurred in about 29 percent. The chi-square test results shown in Table 4 reveal that the decisions in this study were not significantly different from all awards in the LRP data bank. Furthermore, when split decisions were expanded to determine who won most frequently, management prevailed. This is illustrated in Table 5 which shows that approximately 68 percent of the split decisions favored management, while approximately 21 percent favored the union.

No research indicates that arbitrators are biased for management. The reasons for management’s apparent advantage were not a major issue in this research. It is possible that management won more frequently because of a competitive advantage—employers have more resources for arbitration. Legal counsel or an in-house labor relations specialist typically follows a disciplinary case from the time of the incident, through the grievance process and arbitration.
With that advantage, management may be better prepared for arbitration.

In the case of the union, however, a union steward or other in-house union representative may lack the education, training, experience, time and money to adequately represent the grievant's interests. As indicated in Table 17, management was the only party at the hearing to be represented by an attorney in 28 percent of the cases. The union, on the other hand, was the only represented party in just 5 percent of the cases.

Priorities may vary for the parties as well. The union may go through the motions for political reasons in some cases, while the company may have more at stake and may be willing to expend more resources in order to assure a win. For example, management may perceive the loss of an arbitration case a serious threat to the right to manage and control the workforce in a safe and efficient manner. Thus, winning the case would assume a high priority.

Another plausible explanation is that management's weaker cases are settled as they cycle through the grievance procedure. Consequently, only the stronger cases make it to arbitration.

It was predicted that grievants in alcohol-related cases would receive more favorable awards than grievants in drug-related cases. This hypothesis was also predicted in the findings of Coulson and Goldberg (1987, 179), Denenberg
There were basically no differences in the outcomes of the arbitration awards of the 249 cases in this study when compared to the LRP statistics. However, when the cases were divided according to the legal status of the substance, illicit drug users did not fare as well in arbitration cases as did legal drug users.

One of the major purposes of this study was to determine whether or not disparate arbitral treatment based on the legal status of the substance exists and, if so, if it could be justified when based on the intent of the parties as embodied in the collective bargaining agreement? The answers to these questions are yes and no.

Denenberg and Denenberg (1983, 18) suggested three probable causes for the different treatment. First, alcoholism and alcohol use are familiar conditions in society. In a sense, alcohol use, albeit an economic and social drain on society, is culturally accepted. Illicit drug use and drug addicts do not share the same social tolerance. Second, drugs are associated with youth. Arbitrators are usually older, which may account for the different treatment of illicit drug users. Third, illicit drug use has the "taint of criminality." It is, in fact, against the law in most states to use marijuana, cocaine and heroin. Arbitrators may treat illicit drug users differently because of an intolerance for law violators.
Ben-Yehuda's (1986, 1987) research suggested another possible explanation. Americans may have an instinctive reaction to illicit drugs. Ben-Yehuda found that many people are conditioned to react to illicit drugs, and that Americans are generally prone to moral indignation (1987, 19). Moral entrepreneurs, law enforcement agencies, politicians, federal agencies and the media have generated a response in Americans which Ben-Yehuda (1986, 496) refers to as moral panic.

As discussed in Chapter II, there seems to be a great deal of "fear mongering" about illicit drugs by politicians, law enforcement officials and others. Situations involving illicit drugs seem to be more newsworthy than situations involving alcohol. A retired athlete who dies prematurely is immediately suspected of drug overdose—as witnessed in the media coverage of the death of John Matuszak. Yet, the death of an older athlete caused by years of alcohol abuse may go completely unnoticed.

Can it be said that moral conditioning has had an effect in the arbitration world? Perhaps. There are considerably more published cases related to illicit drugs than to alcohol. In this study, which spanned the 1980s, approximately 60 percent of the cases involved illicit drugs. Marmo (1983, 41) analyzed 191 arbitration cases related to alcohol and drugs which were published from 1963 to 1980, and only 46 percent involved illicit drugs.
Does this mean that there are more illicit drug users in the workplace than there are alcohol users? Not really. Alcohol is still, by far, the most widely-used mood-altering drug in American society (Trice and Roman 1978, 1).

If Americans are easily sensitized by moral entrepreneurs, more articles about illicit drug problems in business journals, more crusades against illicit drugs in the workplace, increased disciplinary actions against illicit drug users, and more arbitration cases involving grievants with drug problems can be expected. Increased numbers of published arbitration awards dealing with drugs can also be expected. New "war on drug" industries such as drug testing labs, employee assistance consultants and drug training programs are likely to flourish.

Some insight into the disparate treatment was obtained when decision cues were examined based on the legal status of the substance. The prediction that dominant decision cues would not vary depending on the legality of the substance was, for the most part, correct. However, arbitrators discovered fewer problems of equal treatment by management in the discipline of illicit drug users. If arbitrators are conditioned to react negatively to illicit drug users, they may characteristically fail to see a problem of equal treatment by management when an illicit drug is involved.
Is there any solid evidence that arbitrators are influenced in their decision-making by the drug problem hysteria? Not really, although it seems apparent that illicit drug users were more adversely affected in arbitration than were alcohol users. On the other hand, to assume that arbitrators are not morally conditioned regarding illicit drugs is probably naive.

It is clear that arbitrators were consistent in justifying their awards. This was evidenced by the frequent use of the dominant cues throughout the awards. Proof of misconduct was cited in almost every case. The appropriateness of the penalty, the reasonableness of management’s action, and the knowledge of the rules and consequences were also frequently mentioned.

Logistic regressions also confirmed consistency. Unless management met the tests, particularly proof of misconduct, they did not prevail at arbitration. Arbitrators were also consistent in the application of decision cues when controlling for the legality of the substance. With the exception of equal treatment, arbitrators consistently cited the same cues, irrespective of the legal status of the drug.

These results are consistent with the findings of Gross (1967), Landis (1977), Peterson (1970), and Prasow and Peters (1970). However, they contradict the findings of
Stahl and Cain (1981, 191) who found that arbitrators appeared to use different policies.

There were no significant differences in arbitral award outcomes based on gender. This contrasted with Bemmels' (1988, 705) study which found evidence that arbitrators sometimes treated females more leniently than males. The findings of this study are more consistent with the findings of Bigoness and Dubose (1985, 489) whose study of mock arbitration awards found no gender effects. Caution should be exercised when considering the gender effect results of this study due to the small number (29) of females in the sample.

The fact that drug testing did not significantly impact decision outcomes was an interesting finding and warrants closer analysis. Assuming the findings were correct, and that drug testing did not enhance management's probability of winning, those who oppose drug testing may gain some ground and the growing drug testing industry may suffer a setback.

The fact that legal representation had an impact on the arbitral decision outcomes is not good news for grievants with substance-abuse problems. This is particularly true for those involved with illicit drugs. The finding that management was represented by attorneys more often than the union may indicate that unions could not afford the luxury of legal counsel. Nevertheless, the results were the same.
Grievants can expect to lose more often when management is represented by an attorney at the hearing.

Conclusions

This research established one fact quite clearly: Arbitrators consistently rely on specific criteria when making awards in drug and alcohol cases. This information is beneficial to industrial relations practitioners. Management should know that, first and foremost, they must present proof of misconduct for all allegations made against grievants. They cannot win otherwise. Assuming the evidence of misconduct is solid, it is also important to justify a business necessity for the action and to demonstrate equal treatment of other employees in similar circumstances.

Arbitrators are less interested in whether management gave proper notice of the rule and its consequences. Since possession or use of alcohol and drugs is probably perceived as an offensive act, it should require no more notification of consequences than stealing.

In addition, management should at least go through the motions of an investigation before taking action. A suspension pending an investigation is a good practice.

The priority of action for the union should be similar to that of management. Management has the burden of proof and must meet the tests which are important to the
arbitrator. The union must show that management failed at one of its arbitral tasks. The priority should be to discredit management's evidence and witnesses or, failing that, to demonstrate that the disciplinary action was an "overkill" due to the nature of the offense, the lack of business relatedness, the grievant's tenure and work record, or the discriminatory effect of the disciplinary action. No harm is done in advocating improper notification or inappropriate action, but it will most likely not be crucial to the arbitrator's decision.

The disparate treatment of illicit drug users in arbitration, as predicted by others, was supported by this research. Whether the situation was justified or not was not examined. It may simply reflect the dominant values of American society. Whatever the reason, it is an invitation for further examination and research.

Recommendations

The following section deals with suggested research to support or contradict the findings and conclusions of this study.

There are a few remaining issues with respect to Daugherty's seven tests. The concept of a fair investigation and its importance in disciplinary cases deserves more study. It may also be worthwhile to survey arbitrators and union and management representatives to determine their
opinions on the importance of the seven tests in various disciplinary scenarios.

The implied favorable bias toward legal drug users deserves further study. The analyses assumed that legal drug grievants and illicit drug grievants had equally valid grievances and an equal chance of winning based on the merits of the grievances. The analyses also assumed equality among other arbitral conditions. These assumptions may not be valid for several reasons (Bemmels 1988, 705), the most important being that no two arbitration settings are ever identical.

A mock arbitration, along the lines of Bigoness and DuBose’s (1985) work using students, or a mock arbitration using arbitrators as subjects may be in order. Another possibility is a survey of two groups of arbitrators using a case identical in circumstances, but differing in the substance involved—alcohol vs. illicit drug.

Questions for further research generated by this study are listed below:

1. What is the nature of split decisions? Were the results of this study regarding split decisions typical? Why is management favored in a split decision?

2. What is the trend in alcohol- and drug-related labor arbitration awards? If this study had been expanded to include cases twenty years prior to 1980, would a trend
be established for the manner in which arbitrators have granted awards in alcohol and drug cases?

3. Why are there more illicit drug-related cases than alcohol-related cases in the published awards?

4. What is the mix of decision cues in disciplinary cases not involving "industrial capital offenses?" What are the decision cues for "industrial capital offenses" other than alcohol and drug cases?

5. Are the effects of legal representation in this study typical? Why or why not?

6. What is the relationship between quantum of proof standards and decision outcomes?

These are only a few examples of possible further research topics related to this study. Many more statistical analyses could be performed on the twenty variables collected for this research to determine other relationships.
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6. INTOXICATION  8. USE IMPAIRS PERFORMANCE
7. _______________________

OBTAINED PERSON ON BREAKING THE RULES
1. DENIES  2. ADMITS

LOCATE
1. IMMEDIATE WORK AREA  2. BREAK OF LUNCH AREA  3. PREMISES
4. OFF PREMISES  5. _______________________

POLICE INVOLVEMENT
1. NONE  2. INVEST.  3. INVEST. WITH ARREST

UNDERGOING INVOLVEMENT
1. YES  2. NO

AWARD INFORMATION--WINNER
1. UNION  2. COMPANY  3. SPLIT

SPLIT WINNER
1. UNION  2. COMPANY  3. TOSS-UP

REINSTATEMENT CONDITIONS
1. WITHOUT BACK PAY  2. WITH SOME BACK PAY, _______ DAYS
3. WITH PROBATION  4. WITH REHAB  5. BOTH  6. NO STRINGS
7. SENIORITY...WITH...WITHOUT  8. ________________

ARBITRATOR'S DECISION CUES
CUE ________________________________
CUE ________________________________
CUE ________________________________
CUE ________________________________
CUE ________________________________

STANDARDS OF PROOF ________________________________

CITATION OF PRIOR ARBITRATION AWARDS, COURT CASES AND OTHER AUTHORITIES

ARBITRATOR
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CONNECTION 1. JUSTIFY AWARD  2. CLARIFY ISSUES  3. BOTH

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