

Notes

RESPONSE TO THE EXPERIMENTAL ROLE OF SETTLEMENT JUDGES IN UNFAIR LABOR PRACTICE PROCEEDINGS

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I. INTRODUCTION

Among the many things that Commissioner William Gould plans to accomplish during his term with the National Labor Relations Board (“NLRB” or “Board”) is to change the role of the administrative law judges.¹ Specifically, the Commissioner would like to assign some of the agency’s administrative law judges to conduct settlement negotiations with conflicting parties and to give these judges the power necessary to work effectively in these settlements.²

According to this plan, the judges will preside over conferences and settlement negotiations between the parties, assess the negotiations, and make recommendations as to continuation or termination of the settlement process.³ The settlement judge will have the power to require that the representatives for each party be present at settlement conferences,⁴ and all conversation between the parties and the settlement judge shall be confidential.⁵ Accordingly, the settlement judge shall not confer with the trial judge on any aspect of the case, and no evidence with respect to statements, conduct, offers of settlement, or concessions of the parties made in proceedings before the settlement judge shall be admissible in any proceeding before the Board, except by stipulation of the parties.⁶ Lastly, any settlement realized under the patronage of a settlement judge shall be subject to approval in compliance with section 101.9 of title 29 of the Code of Federal Regulations, which regulates the NLRB’s settlement procedures.⁷

1. William B. Gould IV, Statement Before the Commission on the Future of Worker-Management Relations (Sept. 29, 1994) (transcript available from the National Labor Relations Board and on file with the *Arizona Law Review*). Currently, administrative law judges conduct formal hearings in unfair labor practice cases. The administrative law judges’ decisions are appealable to the NLRB. 57 N.L.R.B. ANN. REP. 4 (1992).

2. The NLRB proposes to amend its rules regarding the role that its administrative law judges play in facilitating the quick resolution of unfair labor practice proceedings. 59 Fed. Reg. 46,375 (1994) (codified at 29 C.F.R. 102.35) (West 1995) (effective until Jan. 31, 1996).

3. 59 Fed. Reg. 65,942, 65,944, 65,945 (1994) (codified at 29 C.F.R. 102.35).

4. *Id.* at 65,944.

5. *Id.* at 65,945.

6. *Id.*

7. *Id.* See *infra* notes 38–46 and accompanying text.

Commissioner Gould's theory behind the use of administrative law judges as settlement judges is that it will enhance the possibility of settlement.⁸ This theory is based on the premise that if the disputing parties have the expert assistance of a third party mediator, they will be willing to discuss a possible compromise.⁹ Furthermore, the parties will not be permitted to use anything divulged in the proceedings against each other in the adjudication process.¹⁰

This Note demonstrates that the Commissioner's experiment regarding the use of administrative law judges as settlement judges is unnecessary due to the high settlement rate in unfair labor cases.¹¹ Furthermore, adding a judge for his or her expertise in an area where the attorneys involved generally have a great deal of expertise is not cost effective and may even have a negative effect on settlement discussions at the regional level.¹² Lastly, the Commissioner's experiment may reduce the availability of administrative law judges used for trial purposes, causing increased delay in hearing dates.¹³

In order to reach the Commissioner's goal of diminishing wasteful and time consuming litigation,¹⁴ an alternative to the settlement judges would be to lessen the severity of the Board's standard of review for formal settlements. Currently, the Board uses a standard of review that determines, "whether under the circumstances of the case, [the settlement] will effectuate the purposes and policies of the [National Labor Relations Act] to give effect to any waiver or settlement of charges of unfair labor practices."¹⁵

This standard of review seems especially strict when one takes into account the Board's standard of review for arbitration decisions. Specifically, the NLRB will defer to an arbitrator's decision when the following criteria are met.¹⁶ The unfair labor practice issue must be presented and considered by the arbitrator.¹⁷ The arbitral proceeding must be fair and regular.¹⁸ All parties must agree to be bound, and the arbitrator's decision cannot be clearly repugnant to the purposes and policies of the National Labor Relations Act.¹⁹ This Note contends that the NLRB should change the standard of review for settlements to a standard that requires only that the settlement not be clearly repugnant to the purposes and policies of the Act. By doing so, the Board would achieve its goal of diminishing wasteful litigation without the needless expense of settlement judges.

8. See Gould, *supra* note 1.

9. See Gould, *supra* note 1.

10. See Gould, *supra* note 1.

11. See *infra* notes 130-41 and accompanying text.

12. See *infra* notes 164-66 and accompanying text.

13. See *infra* notes 162-66 and accompanying text.

14. See Gould, *supra* note 1.

15. Independent Stave Company, Inc., 287 N.L.R.B. 740, 741 (1987) (citing National Biscuit Co., 83 N.L.R.B. 79, 80 (1949)).

16. Speilberg Manufacturing Co., 112 N.L.R.B. 1080, 1082 (1955).

17. *Id.*

18. *Id.*

19. *Id.*

Background

The National Labor Relations Act (the "NLRA" or the "Act")²⁰ prohibits unfair labor practices²¹ and provides a mechanism to enforce fair labor practices, namely the National Labor Relations Board.²² The NLRB is an independent Federal Agency which administers labor law pertaining to the relationship between labor unions and employers who are engaged in interstate commerce.²³ The Board, which consists of five members,²⁴ is headed by a chairman appointed by the President.²⁵ President Bill Clinton nominated William B. Gould as chairman of the NLRB on June 28, 1993,²⁶ and Mr. Gould's term began on March 3, 1994.²⁷

Section 151 of Title 29 of the United States Code Annotated asserts the policy of the National Labor Relations Act. The Act was designed to foster industrial peace and stability by encouraging the practice and procedure of collective bargaining.²⁸ Section 151 does not compel agreements between employers and employees, but rather commands free opportunity for negotiations likely to bring about adjustments and agreements which will further industrial peace.²⁹ Furthermore, the promotion of industrial peace diminishes the chance of strikes, lockouts, or other methods of fighting between labor and management which cause devastating economic strife.³⁰ In order to avoid disputes between labor and management, the Board has always urged compromises and settlements.³¹ The purpose of these settlements has been to end labor controversies, or if possible, to avoid them all together.³²

II. SETTLEMENT PROCESS

When a business or a labor organization has committed an unfair labor practice, an employee, union or employer can file charges with the NLRB at

20. 29 U.S.C. §§ 151-87 (1988).

21. See 29 U.S.C. § 158 (1988) (detailing what is considered unfair labor practices for employers and unions).

22. 29 U.S.C. § 153 (1988).

23. 57 N.L.R.B. ANN. REP. 2 (1992).

24. 29 U.S.C. § 153 (1988).

25. *Id.* "The President shall designate one member to serve as Chairman of the Board."
Id.

26. William B. Gould IV has been a professor at Stanford Law School since 1972 and a member of the National Academy of Arbitrators since 1970. Gould taught at Wayne State Law School and was a Visiting Professor at Harvard Law School. He also worked as an attorney for the National Labor Relations Board, represented management in labor law matters for a private New York firm, and was Assistant General Counsel to the United Auto Workers. See *President Clinton Names William Gould to the National Labor Relations Board*, U.S. NEWSWIRE, June 28, 1993, available in LEXIS, Nexis Library, WIRES File.

27. See *President Clinton Names National Labor Relations Board Chairman Gould to Council of Administrative Conference of United States*, 1994 WL 540212 (N.L.R.B., Sept. 29, 1994).

28. 29 U.S.C. §§ 151-87 (1988); *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 265 (1964).

29. *Globe Cotton Mills v. N.L.R.B.*, 103 F.2d 91, 94 (5th Cir. 1939). See also *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939) (holding that the Board cannot impose any penalty upon an employer who is engaged in an unfair labor practice, even though the penalty effectuates the Act).

30. *Fansteel*, 306 U.S. at 257.

31. *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248, 253 (1944).

32. *Id.* at 254.

one of its field offices located throughout the nation.³³ The regional professional staff then researches these charges and determines their validity.³⁴ If the regional director finds that the Act has been violated, he seeks a voluntary settlement.³⁵ If the settlement efforts fail, the case proceeds to adjudication before an administrative law judge.³⁶ If there still is no settlement after this point, the Board decides the case.³⁷

Parties to a labor dispute may settle the dispute in various ways including formal or informal settlements.³⁸ The informal settlement is the most frequent type of settlement.³⁹ Informal settlements provide for the withdrawal of the charge by the charging party, if the other party complies with the terms of the agreement.⁴⁰ The informal settlement then must be approved by the regional director.⁴¹

The formal settlement is used when the investigation of a charge reveals an obvious violation of the statute, violence or an indication the violator is a repeat offender.⁴² Once the parties reach a formal settlement, the NLRB must approve that settlement.⁴³ The Board cannot change the settlement, but must either pass upon it or reject it entirely.⁴⁴

The Board's determination of whether to reject or pass a settlement is governed by statute and case law. Section 101.9 of Title 29 of the Code of Federal Regulations dictates the NLRB's actions regarding settlement. This regulation states that the Agency favors formal settlement over litigation.⁴⁵ Furthermore, the NLRB's procedures dictate that the resolution must not be contrary to public policy and must substantially remedy the unfair labor practices.⁴⁶

The Board has a very strict standard of review for settlement cases due to the fact that the Act promotes public interests rather than private interests.⁴⁷

33. 57 N.L.R.B. ANN. REP. 5 (1992).

34. *Id.* at 5, 6.

35. *Id.* at 6.

36. *Id.*

37. *Id.*

38. KENNETH C. MCGUINNESS, SILVERBERG'S HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD § 14-1 (3d ed. 1967).

39. *Id.* § 14-2.

40. *Id.* § 14-3.

41. THEOPHIL C. KAMM HOLZ & STANLEY R. STRAUSS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD § 6.10(d)(2) (4th ed. 1987).

42. MCGUINNESS, *supra* note 38, § 14-7.

43. MCGUINNESS, *supra* note 38, § 14-7.

44. MCGUINNESS, *supra* note 38, § 14-7.

45. See 29 C.F.R. § 101.9(b)(1) (1994). This section states:

After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to [a] hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order.

Id.

46. N.L.R.B. Statements of Procedure 8, 29 C.F.R. §§ 101.7, 101.9 (1994).

47. See Community Medical Services of Clearfield, Inc. (Clear Haven Nursing Home), 236 N.L.R.B. 853, 853-54 (1978) (there are overriding public interests that statutory rights should not be circumvented); Winston & Mary Louise Rose (Ideal Donut Shop), 148 N.L.R.B.

Another possible reason for the strictness of the NLRB's settlement policy is that the Board assumes that the regional director has a meritorious case,⁴⁸ and the defendants are therefore assumed guilty of the unfair labor practices of which they are accused.⁴⁹ Lastly, the Board has reasoned that, under section 10 of the Act, it has exclusive jurisdiction in unfair labor practice cases and thus the Board's jurisdiction cannot be avoided by private settlements.⁵⁰

A. *Standard of Review Applied to NLRB Cases*

In order to understand the Board's views on settlements, it is important to understand the recent case history and the evolution of the settlement process. Since 1978, the Board has strictly interpreted the standard of review for formal settlements. In *Clear Haven Nursing Home*,⁵¹ a majority of the Board decided that public policy overrode the policy of allowing the private parties to settle their disagreement.⁵²

The settlement in *Clear Haven Nursing Home* did not provide for back pay for employees who allegedly had been discriminatorily denied reinstatement.⁵³ Furthermore, the settlement did not provide for the posting of a notice stating that management would not violate the law again.⁵⁴ The Board stated that the settlement agreement in *Clear Haven Nursing Home* was inadequate due to the fact that it did not promote public interests and the purposes and policies of the Act.⁵⁵

The settlement in *Clear Haven Nursing Home*, although contrary to the Act in the majority's eyes, actually provided for the reinstatement of the striking employees.⁵⁶ According to the union's attorney, the wage rates took into account the back pay.⁵⁷ In addition, the settlement was approved by the employer, the union, and passed by an employee vote of 60 to 14.⁵⁸ Therefore, the union would have gained more for the employees by the settlement than by

236, 237 (1964) (no private right to back pay and reinstatement attaches to an employee which he can bargain away); *Ingalls Steel Constr. Co.*, 126 N.L.R.B. 584, 584 n.1 (1960) ("[F]or once a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and the duty of enforcing the Act in which the public has an interest.").

48. *Clear Haven Nursing Home*, 236 N.L.R.B. 853, 855-56 (1978). "[F]or the limited purpose of passing on the acceptability of a proposed settlement, of necessity we begin with the assumption that the case is meritorious and the General Counsel is prepared to carry his burden of proof." *Id.* See also Allan L. Bioff, "Capitulate or Litigate"—*The Labor Board's Settlement Policy and the Objectives of the National Labor Relations Act*, 47 UMKC L. REV. 289, 292 (1979) (stating that the majority in *Clear Haven* was wrong because the General Counsel does not always have a meritorious case).

49. *Clear Haven Nursing Home*, 236 N.L.R.B. 853, 855-56 (1978).

50. 29 U.S.C. § 160 (1982). Section 10(a) states that the NLRB's power over unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise...." *Id.*

51. 236 N.L.R.B. 853 (1978).

52. *Id.* at 854-55.

53. *Id.* at 853-54.

54. *Id.* at 854.

55. *Id.* at 855. "[W]e are at a loss to understand how a settlement agreement that surrenders employees' entitlement to backpay can be said to protect their interests.... [T]here is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual discriminatees." *Id.*

56. *Id.* at 859 (Penello & Murphy, Members, dissenting).

57. *Id.*

58. *Id.* at 858 n.15.

further litigating the matter.⁵⁹ Furthermore, the dissenters in *Clear Haven Nursing Home* recognized that by approving the settlement, the NLRB would have minimized economic hardships for the employees who were striking, as well as for the employer.⁶⁰ This is because both employees and employers benefit by ending a strike and working. Therefore, the minority's interpretation of the *Clear Haven Nursing Home* settlement agreement did indeed fulfill the NLRA's policy of reducing industrial strife through the promotion of collective bargaining.⁶¹

The NLRB continued its trend of deciding to reject settlements similar to the *Clear Haven Nursing Home* settlement agreement. One such case is *Teamsters Local 115 (Gross Metal Products)*,⁶² in which the NLRB rejected a settlement which stated that the striking employees could not act violently toward the charging party or any other employer doing business with the charging party.⁶³ The Board's order, which was substantially similar to the settlement, stated that the employees were prohibited from acting violently toward businesses at facilities other than that of the charging party.⁶⁴ Therefore, due to the Board's policy on settlement, the parties incurred a greater expense in time and money, while not substantially changing the substance of the settlement. Arguably, this failed to advance the aim of the Act to promote public policy.

In 1987, a five-member Board quorum decided the *Independent Stave* case, and changed the standard of review for formal settlements.⁶⁵ The new standard of review, set out in *Independent Stave*, seems to agree with the dissent in *Clear Haven Nursing Home*.⁶⁶ The standard of review under *Independent Stave* is whether the settlement effectuates the policies and purposes of the Act.⁶⁷ The Board thus set out a list of factors used to indicate whether the settlement achieves this goal.⁶⁸ In deciding whether to accept a settlement agreement, the Board considers the position taken by the General Counsel and whether the parties and the discriminatees agreed to be bound.⁶⁹ Next, the

59. *Id.* at 857.

60. *Id.* at 859.

61. *Id.*

62. 275 N.L.R.B. 1547 (1985).

63. *Id.* at 1548 (Dennis, Member, dissenting) (suggesting that majority denied settlement because they felt that the party was guilty and there was no admission clause in the settlement).

64. *Id.*

65. *Independent Stave, Inc.*, 287 N.L.R.B. 740, 742 (1987).

66. *Id.* at 742. The majority criticizes *Clear Haven Nursing Home*, stating:

The majority was inescapably led to the wrong conclusion that any settlement providing a less than full remedy of the violations alleged was not in accord 'with the public interest in the vindication of statutory rights.' Such an assumption, however, ignores the equally important public interest in encouraging the parties' achievement of a mutually agreeable settlement without litigation.

Id. (citation omitted).

67. *Id.* at 743.

68. *Id.* These factors are:

(1) whether the charging part(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

Board decides whether the settlement is reasonable in light of the violations alleged and the risks and stage of litigation.⁷⁰ Lastly, the Board determines whether there has been any fraud, coercion or duress, and whether the respondent has a history of violating the Act or other settlement agreements.⁷¹

Although the *Independent Stave* standard of review is easier to meet than that of its predecessor *Clear Haven Nursing Home*, the *Independent Stave* standard of review still thwarts settlement. For example, in September of 1993, the NLRB, under Chairman Stephens, rejected a settlement in *Frontier Foundries, Inc.*⁷² In that case, the administrative law judge issued an order approving the settlement.⁷³ The settlement called for liquidated damages in addition to a reduced amount of back pay.⁷⁴ The settlement was agreed to by both the respondent and the alleged discriminatees.⁷⁵ The majority of the Board, which consisted of only Chairman Stephens and Member Raudabaugh, found the portion of back pay in the settlement unconscionably small and therefore refused to pass the settlement.⁷⁶ The majority used the *Independent Stave* test in deciding whether to accept the settlement agreement.⁷⁷ In using this test, the majority denied the settlement based on the opposition of the General Counsel and on the fact that, due to the serious nature of a section 8(a)(3) violation, full back pay is the norm.⁷⁸

Of the three members deciding *Frontier Foundries*, one dissented.⁷⁹ Member Devaney dissented based on the fact that the agreement was arrived at by the respondent and the alleged discriminatees.⁸⁰ The parties were not able to freely negotiate the remedies to certain unfair labor practices,⁸¹ even though the administrative law judge agreed to this settlement.⁸²

If a settlement judge had been used in this case, the parties and the settlement judge would have been restricted as to how they settled, making settlement more difficult than it would have been under a standard of review that would reject a settlement only if it were repugnant to the Act. Had the latter been the standard of review in *Frontier Foundries*, the settlement would have been permitted to stand and unnecessary time and litigation would have been avoided.

Id.

69. *Id.*

70. *Id.*

71. *Id.*

72. 312 N.L.R.B. 73 (1993).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 73-74. (the respondent violated §§ 8(a)(1) and (3) by basing layoffs on activities for the United Steelworkers of America). Section 8(a)(3) makes it illegal for an employer to discriminate based upon an employee's involvement with labor organizations. 29 U.S.C. § 158(a)(3) (1988).

79. *Frontier Foundries, Inc.*, 312 N.L.R.B. 73, 74 (1993) (Devaney, Member, dissenting).

80. *Id.*

81. This case is an example of how the Board thwarts freedom of contract and settlement between consenting parties.

82. *Frontier Foundries, Inc.*, 312 N.L.R.B. 73, 73 (1993).

B. Analysis of the NLRB's Settlement Policies

An analysis of the NLRB's standard of review begins with the historical motives behind this strict standard of review. However, these motives are no longer applicable due to changes in society and the legal system over the duration of the Act.

Initially, the NLRA had exclusive jurisdiction over labor disputes.⁸³ Therefore, if the parties to a dispute were unable to obtain redress through the NLRB, they would be unable to get help elsewhere. This is no longer the case. Instead, parties are now able to make use of other federal and state remedies.⁸⁴ Furthermore, the Board, when deciding on this policy of review for settlements, had a much smaller caseload than it does today.⁸⁵ In addition, the Board, when deciding to review settlements, did not have cases pending for the length of time it does now.⁸⁶

When the NLRA was first enacted to protect unions, one of the NLRB's biggest concerns was the inequality of bargaining power between unions and powerful employers.⁸⁷ However, since that time, the unions have increased their bargaining power.⁸⁸ Also, the negotiators are generally experienced, and the workers are more educated now than they were at the beginning of the Act. Therefore, the NLRB's position on settlements is paternalistic because they substitute what they consider to be adequate remedies over what the injured private party considers to be a fair remedy.⁸⁹

83. 29 U.S.C. § 160 (1988). Section 10(a) of the NLRA states that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise...." *Id.* See *Texaco, Inc.* 273 N.L.R.B. 1335, 1335 (1985); *E.L. Wiegand Div., Emerson Elec. Co.*, 246 N.L.R.B. 1143, 1149 (1979); *Clear Haven Nursing Home*, 236 N.L.R.B. 853, 853 (1978). See also *Cornelius J. Peck, A Proposal to End NLRB Deferral to the Arbitration Process*, 60 WASH. L. REV. 355, 361 (1985) (stating that at one time, it was believed that the NLRB had exclusive jurisdiction over activities which dealt with sections 7 and 8 of the Act, but the law did not develop that way due to the deterioration of the belief that all problems affecting employment would be resolved by promoting the process of collective bargaining).

84. See *Smith v. Evening News Ass'n*, 371 U.S. 195, 197, 201 (1962) (unfair labor practice could be subject of state action due to breach of contract). See also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957) (breach of contract action can be brought in any federal district court having jurisdiction over the parties pursuant to § 301(a)). *But see San Diego Bldg. Trades v. Garmon*, 359 U.S. 236, 245 (1959) (holding that all unfair labor practices under sections 7 and 8 "arguably" fall under the exclusive jurisdiction of the NLRB).

85. In fiscal year 1937, the NLRB received 3,124 unfair labor practice cases. 2 N.L.R.B. ANN. REP. 19 (1937). In fiscal year 1992, the Board received 32,442 unfair labor practice cases. 57 N.L.R.B. ANN. REP. 1 (1992).

86. See *William B. Gould IV, Statement to the Washington State Labor Council Constitutional Convention* (Aug. 22, 1994) (transcript available from the National Labor Relations Board and on file with the *Arizona Law Review*) (stating that it takes about 51 days on average for the General Counsel to issue a complaint; after that, it takes an additional five to six months on average for the administrative law judge to issue a ruling; then the ruling can be appealed to the Board).

87. See, e.g., 29 U.S.C. § 151 (1988). See *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975) (elimination of inequality of bargaining power is one of the intentions of the Act).

88. R. COULSON, *HOW TO STAY OUT OF COURT* 173-74, 178 (1968).

89. See *Clear Haven Nursing Home*, 236 N.L.R.B. 853, 859 (1978) (Penello & Murphy, Members, dissenting) (employees are adults who, with the assistance of their union representatives, are well qualified to make decisions affecting their future).

The current settlement review standard further disserves private interests involved in the labor-management relationship by increasing litigation. In the same respect, the current policy harms the public interest by generally harming labor-management relationships and the negotiation process. The public's interest cannot be served by thwarting freedom of contract, which the Board recognizes by its policy on arbitration. For example, if *Frontier Foundries* had been arbitrated rather than settled, the Board certainly would have deferred to the arbitrator due to the different standard of review allotted to arbitration agreements.⁹⁰

The distinction between arbitration and settlement does not seem significant enough to require different standards of review.⁹¹ In fact, it would seem logical to have a similar standard, or even a more relaxed standard of review, for settlements. Specifically, with settlements, the remedies for the unfair labor practice are reached and agreed upon by the parties in the dispute,⁹² whereas in arbitration, the parties have agreed to have someone else decide on the remedies.⁹³

Lastly, the NLRB's standard of review for settlements actually discourages settlement. Lawyers' and parties' expectations and attitudes for settlement are very important in achieving such settlements.⁹⁴ For example, when a lawyer is expecting to settle, there is a change in his attitude making him more amenable to settlement⁹⁵ and that lawyer is thus more likely to resolve difficulties in the negotiation process.⁹⁶

Therefore, since the NLRB has a standard of review which thwarts the attorney's ability to settle at will, the attorneys come into the negotiations with unnecessary obstacles to settlement. Other administrative law agencies have recognized this trouble and have changed their standard of review accordingly. For example, the Occupational Safety and Health Review Commission ("OSHRC"), has deleted its settlement approval provision which provided that

90. See *Spellberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955) (deferral is proper if the arbitration proceedings were fair and regular, if all parties agreed to be bound and if the arbitrator's decision is not clearly repugnant to the Act). This doctrine was later revised by holding that clearly repugnant to the Act meant "palpably wrong." *Olin Corp. & Local 8-77, Oil, Chem. and Atomic Workers Int'l Union*, 268 N.L.R.B. 573, 574 (1984). Furthermore, in *Olin*, the Board held that in order for deference to be valid, the arbitrator must have considered the claim brought under the Act. *Id.* Lastly, *Olin* revised its deferral doctrine by shifting the burden of proof to the party opposing deferral to prove defects. *Id.*

91. See *Roadway Express, Inc. v. N.L.R.B.*, 647 F.2d 415, 419 (4th Cir. 1981) (setting forth a policy of deferral to settlements and arbitration when certain conditions are satisfied); *Combustion Engineering*, 272 N.L.R.B. 215, 217 n.13 (1984) (approving a settlement where the parties made concessions to avoid arbitration although the employee did not receive backpay) (citing *Coca-Cola Bottling Co.*, 243 N.L.R.B. 501, 502 (1979)).

92. 57 N.L.R.B. ANN. REP. 1 (1992).

If the charge has merit, the Regional Director seeks voluntary settlement or adjustment by the parties to the case to remedy the apparent violation; however, if settlement efforts fail, the case goes to hearing before an NLRB administrative law judge and, lacking settlement at later stages, on to decision by the five-member Board.

Id.

93. WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW 136 (1982).

94. Daniel Joseph & Michelle L. Gilbert, *Breaking the Settlement Ice: The Use of Settlement Judges in Administrative Proceedings*, 1988 ADMIN. CONF. U.S. RECOMM. REP. 281, 295-96, 299 (1988).

95. *Id.* at 295-96.

96. *Id.*

the settlement must be "consistent with the provisions and objectives of the Act."⁹⁷ The OSHRC made this deletion in order to keep the Commission's role in reviewing settlement agreements limited.⁹⁸

III. ASSIGNMENT AND POWERS OF SETTLEMENT JUDGES

Due in part to the NLRB's policies that were in place at the time of the settlement judge proposal, and because of the inherent problems with assigning settlement judges in an administrative law scheme such as the NLRB, the settlement judges proposed by Commissioner Gould will likely prove ineffective in increasing the settlement rate. This, in turn, will frustrate the Act.

On December 22, 1994, the NLRB added the settlement judge proposal to its procedural rules.⁹⁹ The modification to the administrative law judges' roles is experimental and will take effect on February 1, 1995.¹⁰⁰ The new rules will be effective on all unfair labor cases pending on or after that date, and, unless the modifications are renewed, they will no longer apply to pending or future cases after January 31, 1996.¹⁰¹

The Board's experimental law regarding settlement judges is set forth in amended section 102.35 of title 29 of the Code of Federal Regulations. This section previously covered the duties and powers of administrative law judges and now also includes the assignment and powers of settlement judges.¹⁰² Section 102.35 states that a settlement judge may be assigned upon the request of a party or a judge assigned to hear the case.¹⁰³

Most litigating lawyers are aware of a phenomenon which occurs when it becomes clear that a case will be settled. There is an attitudinal change, sometimes partially or wholly marked, when difficulties and disagreements become things to be understood and ironed out; from then on effort is expended on resolving differences rather than developing them into adversary positions.

Id.

97. 51 Fed. Reg. 32,013 (1986) (quoting prior rule at 29 C.F.R. § 2200.100(a)(1991)). See Morell E. Mullins, *Alternative Dispute Resolution and the Occupational Safety and Health Review Commission: Settlement Judges and Simplified Proceedings*, 5 ADMIN. L.J. 555, 586 (1991) (attributing part of their success with settlement judges to their simplified standard of review).

98. See Mullins, *supra* note 97. The OSHRC's current procedures for settlement approval are:

(a) Policy. Settlement is permitted and encouraged by the Commission at any stage of the proceedings. (b) Requirements. The Commission does not require that the parties include any particular language in a settlement agreement, but does require that the agreement specify the terms of settlement for each contested item, specify any contested item or issue that remains to be decided..., and state whether any affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. Unless the settlement agreement states otherwise, the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period will be with prejudice.

29 C.F.R. § 2200.100 (a)-(b) (1994).

99. 59 Fed. Reg. 65,942-45 (1994).

100. *Id.*

101. *Id.*

102. 29 C.F.R. 102.35 (b) (West 1995) (effective until Jan. 31, 1996); 59 Fed. Reg. 65,944.

103. 59 Fed. Reg. 65,943. In addition, all parties must agree to the use of the settlement judge. *Id.*

The chief administrative law judge, the deputy chief administrative law judge or one of the associate chief judges may also assign a settlement judge on his or her own motion.¹⁰⁴ The chief, deputy chief or associate chief judge then determines whether to assign the settlement judge using his own discretion. The judge makes his decision by taking into account the prospect of dispute resolution, whether the request for the assignment was made in good faith, and whether the assignment is otherwise feasible.¹⁰⁵ Next, when possible, the settlement judge meets with the parties to pilot the settlement conference.¹⁰⁶ The settlement judges "convene and preside" over these conferences as well as the settlement negotiations.¹⁰⁷ Furthermore, the settlement judges are responsible for reporting to the chief, deputy or associate judge on the likelihood of settlement and for making recommendations regarding the duration of the negotiation process.¹⁰⁸ The chief, deputy or associate judge may then decide to terminate the participation of the settlement judge.¹⁰⁹ Furthermore, the statute states that the settlement negotiations "shall not unduly delay the hearing."¹¹⁰

Under the amended section 102.35, all discussions between the parties and the settlement judge are confidential.¹¹¹ The settlement judge is precluded from discussing the case with the hearing judge, and evidence regarding statements, conduct, offers of settlement and concessions of the parties made before the settlement judge shall not be admissible during proceedings before the Board unless agreed upon by the parties.¹¹² Lastly, the documents disclosed in the settlement process may not be used in litigation unless generated voluntarily or secured pursuant to a subpoena.¹¹³

The same rules that apply to the approval of settlements by the Board have not changed with regard to the assistance of settlement judges. Therefore, a settlement reached with the aid of a settlement judge is still subject to approval under section 101.9 of the Board's Statements of Procedure.¹¹⁴

A. Analysis of the Proposed Rules

One of the advantages of using settlement judges is that such judges are knowledgeable about labor law. Being a trial judge allows the judge to give the parties his opinion on how he would rule if this case were to come before him.¹¹⁵

104. *Id.* at 65,944.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 65,945. The decisions of the chief, deputy or associate judge regarding the assignment or the termination of the settlement judge are appealable to the Board. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*; 29 C.F.R. § 101.9 (1994).

115. Daniel Joseph & Michelle L. Gilbert, *Breaking The Settlement Ice: The Use Of Settlement Judges in Administrative Proceedings*, 3 ADMIN. L.J. 571, 586 (1989) [hereinafter Gilbert]. This Article was prepared originally for the consideration of the Administrative Conference of the United States and was used in developing ACUS Recommendation 88-5, Agency Use of Settlement Judges. *See supra* note 94.

However, there are different roles for settlement judges as compared to trial judges. For instance, a trial judge must seem neutral to the parties in a dispute whereas a settlement judge does not.¹¹⁶ This is important given the belief of many attorneys that a suggestion for settlement by a trial judge indicates that there is a reason that the party should settle, and thus the judge would be annoyed by the party at trial if there were no settlement.¹¹⁷ Furthermore, administrative law judges are not members of the judicial branch of government.¹¹⁸ Instead, administrative law judges work for the same agency as the Board attorneys.¹¹⁹ Therefore, it is quite important to the function of administrative law judges that they appear impartial during trials.¹²⁰ Administrative law judges who preside over hearings are further restrained in the settlement process by statutory limitations on their conduct, such as prohibitions on ex parte contacts.¹²¹ Thus, by using administrative law judges as settlement judges, the judges are able to dispense with some of the restrictions and formalities placed upon their conduct in trial. Moreover, settlement judges can make significant contributions to the settlement process even if settlement is not reached immediately.¹²²

Although there are advantages to the use of settlement judges, and in fact settlement judges have been employed successfully in other administrative agencies,¹²³ in the NLRB context, the possible disadvantages far outweigh any advantages that might be gained.

The settlement judge rules are based on Recommendation 88-5 of the Administrative Conference of the United States ("ACUS").¹²⁴ The article, *Breaking The Settlement Ice: The Use Of Settlement Judges In Administrative Proceedings* (the Joseph and Gilbert report),¹²⁵ written by Daniel Joseph and Michelle Gilbert, was used as the basis for the ACUS Recommendation 88-5. This highly respected article listed three factors in which the use of settlement judges would be useful.¹²⁶ The first factor is a "crowded docket with relatively

116. *Id.* at 582.

117. *Id.* at 582-83 n.75 (citing WAYNE D. BRAZIL, *SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES* 67 (1985)).

118. Mullins, *supra* note 97, at 560. "The adjudicative hearing officer, usually an administrative law judge (ALJ) is, despite a large degree of independence, not a member of the judicial branch of government." *Id.*

119. Letter from Ellen J. Dannin, *infra* note 169 (administrative law judges can create an appearance of bias since they work for the same agency as the Board attorneys).

120. Mullins, *supra* note 97, at 560.

121. Administrative Procedure Act, 5 U.S.C. §§ 554(d), 557(d) (1988). *See* 5 U.S.C. § 556(e) (1988) (limiting decision exclusively to matters on record).

122. Wayne D. Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DISP. RESOL. 1, 3 (1987).

Most settlement conferences do not result in immediate agreements, but the A.B.A. survey shows that judges can make subtle and significant contributions even in conferences that seem to go nowhere. In many cases, the parties cannot reach an agreement in the first conference; two or more conferences are often essential.

Id. (citing BRAZIL, *SETTLING CIVIL SUITS* 39 (1985)).

123. *See* Gilbert, *supra* note 115, at 578-82. *See also* Mullins, *supra* note 97, at 587-610 (discussing the successful implementation of settlement judges in the Occupational Safety and Health Review Commission).

124. *See supra* note 94.

125. Gilbert, *supra* note 115, at 571.

126. Gilbert, *supra* note 115, at 594-95.

few cases being settled."¹²⁷ The second factor is the "presence of a large proportion of factual issues that are not of major precedential importance."¹²⁸ The third factor is that the remedies should be "susceptible to gradation and compromise."¹²⁹

In the fiscal year 1992, the NLRB received 32,442 charges of unfair labor practices.¹³⁰ Forty percent of these charges were meritorious.¹³¹ The merit that a particular case is held to have is significant as far as the workload for the NLRB is concerned. Simply, the higher the merit value of a case, the more litigation required.¹³² In 1992, 87.2 percent of meritorious cases brought to the NLRB were dispensed with formal and informal settlements by the regional offices.¹³³ The cases that are found to have merit, but that are not settled by the regional offices, are issued formal complaints on behalf of the General Counsel.¹³⁴ Once the complaint is issued, the case is scheduled to be heard by the administrative law judge.¹³⁵

In 1992, 3,521 complaints were issued, thus scheduling hearings before the administrative law judges.¹³⁶ However, more settlement occurs before, during and after the hearings. In 1992, the administrative law judges handed down only 658 decisions.¹³⁷ Therefore, of the 32,442 unfair labor charges before the Board, only two percent required a decision by the administrative law judge. The settlement judge proposal is aimed at increasing settlement, thus it is aimed at the 658 cases that required a judicial decision. The Joseph and Gilbert report states that settlement judges should be reserved for problem situations where settlement would occur if not for a barrier to settlement.¹³⁸ In these situations, the parties could benefit from the flexibility and intervention of a settlement judge.¹³⁹ Due to the screening by the regional office of cases with merit, and the encouragement that the regional offices give to settlement, it is unlikely that the unfair labor practice cases which were included in the 658 could then be remedied by a settlement judge.¹⁴⁰ Even if some of the 658 cases

127. Gilbert, *supra* note 115, at 595.

128. Gilbert, *supra* note 115, at 595.

129. Gilbert, *supra* note 115, at 595.

130. 57 N.L.R.B. ANN. REP. 1 (1992) (of these charges, 21,245 were against employers and 10,272 were against unions). *Id.* at 6.

131. *Id.* at 8.

132. *Id.*

133. 57 N.L.R.B. ANN. REP. 7, chart 3A (1992).

134. *Id.* at 9.

135. *Id.*

136. *Id.*

137. *Id.* at 9-10.

138. Gilbert, *supra* note 115, at 587-89.

139. Gilbert, *supra* note 115, at 587-89.

140. Letter from Laurence Gold and James Coppess, American Federation of Labor and Congress of Industrial Organizations, to John Truesdale, Executive Secretary, National Labor Relations Board (Oct. 7, 1994) (on file with the *Arizona Law Review*) [hereinafter AFL-CIO Letter] (the AFL-CIO is a federation of national and international unions whose membership includes 13,500,000 working men and women). The AFL-CIO does not support the use of settlement judges and states:

Given the rigor of these screening and winnowing processes, the cases that presently reach the litigation stage are unlikely candidates for resolution through further settlement processes. These are cases deemed meritorious by experienced public prosecutors (whose all too limited resources set a high "merit" threshold) in which the respondents, despite the Board's emphasis on settlement, have refused to offer any redress of the violation alleged.

could be settled with the assistance of a settlement judge, it is unlikely that the number of additional settlements could outweigh the total cost of the settlement judge program.¹⁴¹

The second factor listed in the Joseph and Gilbert report is that the settlement judge process is best suited when there are a "large proportion of factual issues that are not of major precedential importance."¹⁴² Although labor law cases are generally highly factual,¹⁴³ labor law has been changing recently, and, thus, precedents are important.

Labor law is a changing and important area in international business. With the recent passage of the North American Free Trade Agreement,¹⁴⁴ it would seem that labor law will have to transform in the near future in order for the United States to stay competitive with other countries.¹⁴⁵ Settlement judges will not be an appropriate venue for changes in the law. This is because if a case is part of a new law, the settlement judge will not have any precedent on the books from which to work. Furthermore, if the settlement judge does make a decision in a rapidly changing area of law, there will then be "secret law" that only the settlement judge will know, since he will not be writing opinions. Thus, parties with similar fact patterns could be advised differently by different settlement judges.

Since settlement judges are also trial judges, with the normal caseload of administrative law judges, the settlement judge may have conflicts with cases he is trying to settle and cases that he is hearing as a trial judge.¹⁴⁶ The Joseph and Gilbert report gives an example of such a conflict.

For example, statements the judge makes while seeking settlement in one case may be regarded as prejudicial in the context of another case in which the settlement judge is the presiding trial judge. The risk of such error is multiplied where...there is a well-defined set of regulated entities frequently appearing as parties in agency proceedings and where there is a similarly well-defined bar that specializes in practice before that agency.¹⁴⁷

Since counsel for the General Counsel is responsible for the prosecution of formal complaints, that office would always be involved with the settlement or hearing of formal actions.¹⁴⁸ Furthermore, many of the other attorneys

Id.

141. See Gilbert, *supra* note 115, at 594-95 (stating that, where a large number of cases are being settled without the use of settlement judges, the implementation of a settlement judge program is not advised). "Although the availability of settlement judges would likely increase the number of cases settled prior to adjudication, the effort of introducing such a program would be proportionately greater than the increase in the number of cases settled." *Id.* at 595.

142. Gilbert, *supra* note 115, at 594-95. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 680-82 (1986) (indicating that arbitration is satisfactory in highly factual areas of law such as employment discrimination).

143. See Edwards, *supra* note 142, at 680-82.

144. North American Free Trade Agreement, Dec. 17, 1992, Canada-Mexico-United States.

145. See William B. Gould IV, Remarks at the U.S.-Mexico-Canada Conference on Labor Law and Industrial Relations (Sept. 19, 1994) (transcript available from the National Labor Relations Board and on file with the *Arizona Law Review*). "The success of NAFTA also will influence the relationship between trade and worker rights in the increasingly global marketplace where national borders are rapidly losing their significance." *Id.*

146. Gilbert, *supra* note 115, at 584.

147. Gilbert, *supra* note 115, at 584.

148. 57 N.L.R.B. ANN. REP. 3 (1992).

involved in labor disputes specialize in labor law, and thus may try several cases before the same administrative law judge.

The third factor in the Joseph and Gilbert report involved the ease with which the remedies could be compromised.¹⁴⁹ "The less flexible the remedy, the less successful the settlement judge device will be."¹⁵⁰ Since NLRA prescribes many of the remedies, many of the unsettled unfair labor cases are less flexible.¹⁵¹ Therefore, a settlement judge would not really be able to help the settlement process. For example, if the settlement judge were to give his opinion on a case where the answer to remedies would be a "yes" or "no", the losing side would certainly rather take its chances and go to the trial administrative law judge. Thus, the case would then have used more judicial resources than it would have if it had simply just gone to trial.

The use of settlement judges would therefore be ill-advised in the NLRB context, since it fails the three factors listed in the Joseph and Gilbert report, which was the basis for the development of ACUS Recommendation 88-5.

The article by Morell Mullins, *Alternative Dispute Resolutions and the Occupational Safety and Health Review Commission: Settlement Judges and Simplified Proceedings*, took surveys regarding the use of settlement judges in the OSHRC system.¹⁵² Although the article does point out much success in using the settlement judge, it recognizes that some parties invoked settlement judge proceedings as a formal delaying tactic.¹⁵³ Furthermore, the article states that some attorneys indicated that there was little difference between the work that the settlement judges did and that the trial judge did, as the administrative law judge is active in encouraging settlements anyway.¹⁵⁴ Some of the attorneys interviewed indicated that they had not come across a situation where the use of a mediator such as a settlement judge could aid in settlement.¹⁵⁵

In addition, the settlement judge proceedings do not have a time restraint under the NLRB's plan.¹⁵⁶ OSHRC settlement judge procedures limit the proceedings to forty-five days, unless extended at the request of the settlement judge for another twenty days.¹⁵⁷ By limiting the time for the proceedings, the parties would have less opportunity to use the settlement judge in order to delay the proceedings. Furthermore, it would give the parties a specific time table in which to prepare for the settlement negotiations and trial.

B. Reaction to the Proposed Rules

On September 8, 1994, the Board issued a Notice of Proposed Rulemaking which invited comments to the proposed settlement judge rule.¹⁵⁸ The Board received eight comments on the proposed rule changes, some of which were supportive of using settlement judges, and some of which were

149. Gilbert, *supra* note 115, at 595.

150. Gilbert, *supra* note 115, at 595.

151. AFL-CIO Letter, *supra* note 140.

152. Mullins, *supra* note 97, at 591.

153. Mullins, *supra* note 97, at 600.

154. Mullins, *supra* note 97, at 600.

155. Mullins, *supra* note 97, at 600.

156. See 59 Fed. Reg. 65,944-45 (1994).

157. 29 C.F.R. §§ 2200.101(a)(3), 2200.101(d)(1) (1994). See Mullins, *supra* note 97, at 588.

158. 59 Fed. Reg. 46,375 (1994).

against using settlement judges.¹⁵⁹ One of the comments the Board received was from the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), which stated its opposition to the proposed use of settlement judges.¹⁶⁰

The AFL-CIO's opposition to the experimental rule is based on two of the factors listed in the Joseph and Gilbert report as well as the AFL-CIO's concerns about time constraints in getting the dispute resolved. The concerns of the AFL-CIO include the high amount of settlements that already occur in unfair labor disputes, the types of cases that the NLRB has and their remedies, and the availability of administrative law judges for hearing cases.¹⁶¹ The letter discusses how the number of administrative law judges has declined from 105 in 1981 to 70 today.¹⁶² Furthermore, between 1981 and 1991, while the number of unfair labor complaints fell by almost one-third, the median time between the issuance of the complaint and the decision by the administrative law judge increased by more than ten percent.¹⁶³

Lastly, the AFL-CIO points out that the parties and attorneys may be more pressured to settle, knowing that there is an early trial date.¹⁶⁴ Since the settlement judge rules accord the parties more time before trial, there is less urgency to settle early.¹⁶⁵ Furthermore, by generally diminishing the availability of administrative law judges for hearings, settlements may be reduced by delays in trial dates.¹⁶⁶

The AFL-CIO suggested that the advantage of having a settlement judge who is able to initiate agreement due to the respect that his position possesses

159. 59 Fed. Reg. 65942, 65943 (1994). The Notice also included a change to 29 C.F.R. §§ 102.42 and 102.45(a) which are not within the scope of this Note. 29 C.F.R. pt. 102 (West 1995).

160. AFL-CIO Letter, *supra* note 140. "And, as we now show, in the National Labor Relations Act context, the speculative benefits of adopting such a system do not justify adding yet another responsibility to those already borne by the Board's Administrative Law Judges." *Id.*

161. AFL-CIO Letter, *supra* note 140. The AFL-CIO points out that the benefits of using settlement judges will be small compared to the costs.

No dispute resolution system—certainly no system that provides only modest, non-punitive, make-whole remedies—will produce the settlement of all filed cases. And, surveying the literature, it is unlikely that any such system could drive the percentage of filed NLRA claims that are litigated much below the figure the Board's present system has already achieved. In the NLRA context, then, the benefits of a settlement judge system are likely to be small. In contrast, it is certain that adopting a settlement judge system will diminish the availability of ALJs [administrative law judges] for hearing and deciding unsettled unfair labor practice cases. That is cause for the most serious concern.

AFL-CIO Letter, *supra* note 140.

162. AFL-CIO Letter, *supra* note 140.

163. AFL-CIO Letter, *supra* note 140 (citing 46 N.L.R.B. ANN. REP. 228, tbl. 23 (1981); 56 N.L.R.B. ANN. REP. 216, tbl. 23, 11 chart 6 (1991)). The median age of cases pending the administrative law judge's decision from the filing of the charge on September 30, 1992 is 417 days. 57 N.L.R.B. ANN. REP. 179, tbl. 23 (1992).

164. See AFL-CIO Letter, *supra* note 140.

165. See AFL-CIO Letter, *supra* note 140.

166. See AFL-CIO Letter, *supra* note 140.

It is well known to those experienced in the litigation process that the pressure to settle a case is increased by a firm early trial date. Conversely, any change which appears likely to put off hearing dates in ULP [unfair labor practice] cases, as we believe the assignment of settlement judges will do, is likely to have a negative effect on settlement discussions at the Regional level.

may be captured by having a regional director, regional attorney or a senior staff member conduct the settlement discussions.¹⁶⁷ This may achieve some of the advantages of having a person of authority pilot settlement negotiations, while keeping the administrative law judges free to conduct hearings.¹⁶⁸

Other comments to the proposed rule stated various concerns. For instance, there were concerns that the agency needs to spend more time training administrative law judges on the process of settlement.¹⁶⁹ Another concern regarded the lack of a monitoring system to prevent disclosure about cases between settlement judges and trial judges.¹⁷⁰ Lastly, there was a suggestion to not require a party or counsel to be present in person if the settlement conference was located more than fifty miles away from the office of the party or counsel.¹⁷¹

As suggested by this Note and the comments to the NLRB pertaining to the use of settlement judges, there are several problems that must be surmounted in order for the settlement judge proposal to increase the number of settlements and be cost effective. These problems include the lack of training for administrative law judges in the area of settlement, the inability to compromise some NLRA remedies for unfair labor practices, the decreasing number of administrative law judges available, and the lack of a monitoring system to prevent communications about cases between settlement and trial judges.

IV. CONCLUSION

This Note has demonstrated that the settlement judge proposal will frustrate the National Labor Relations Act by delaying hearings and by not substantially increasing the number of settlements. Furthermore, a less strict standard of review for formal settlements should increase the number of settlements. This should occur by allowing parties more leeway in negotiations. Thus, the theory underlying the Act, which is that free opportunity for

167. AFL-CIO Letter, *supra* note 140.

168. AFL-CIO Letter, *supra* note 140.

169. Letter from Ellen J. Dannin, Professor of Law, to the Office of the Executive Secretary, National Labor Relations Board (Sept. 21, 1994) (on file with the *Arizona Law Review*) (Ellen Dannin served as a Board field attorney from 1980-1991).

Finally, many judges really did not seem to know how to settle a case. It is not surprising that this would be the case, but the agency needs to spend more time training ALJs [administrative law judges] in this crucial task. It could also ferret out which ALJs had the greatest talent for settlement and assign them to this work.

Id.

170. Letter from Thomas A. Lenz to the Office of the Executive Secretary, National Labor Relations Board (Sept. 21, 1994) (on file with the *Arizona Law Review*) (Thomas Lenz was a NLRB attorney and is now a private practitioner). Mr. Lenz is concerned because there is no formal monitoring system in the proposed rule.

The rule establishes no monitoring system to prevent communications about cases between settlement judges and trial judges. While the rule gives lip service to confidentiality of settlement discussions, a mechanism should exist to screen the judges' communications and protect parties or the General Counsel from trial judge predisposition due to settlement conference candor.

Id.

171. Letter from Edward B. Miller to John C. Truesdale, Executive Secretary, National Labor Relations Board (Oct. 5, 1994) (on file with the *Arizona Law Review*).

negotiations between employers and employees will promote industrial peace, will be strengthened by a less strict standard of review.

Alternative dispute resolution has developed in the administrative law areas in order to remedy certain shortcomings in the judicial system.¹⁷² One reason for this result is that formal agency adjudications are much greater than the caseload of the federal judiciary.¹⁷³

The Administrative Conference has expressed, "the best procedure for a program, or even an individual dispute, must grow out of its own needs."¹⁷⁴ It does not seem that the NLRB's proposal for the use of settlement judges, while ignoring the standard of review for settlement, has grown out of its own needs.

172. See Edwards, *supra* note 142, at 668, 681; Mullins, *supra* note 97, at 558; Douglas A. Riggs & Elizabeth K. Dorminey, *Federal Agencies' Use of Alternative Means of Dispute Resolution*, 1 ADMIN. L.J. 125, 126 (1987).

173. See B. SCHWARTZ, ADMINISTRATIVE LAW: A CASEBOOK 43, 45-46 (3d. ed. 1988) (federal agency adjudications outnumber traditional federal court cases); Mullins, *supra* note 97, at 558.

174. Agencies' Use of Alternative Means of Dispute Resolution, ACUS Recommendation No. 86-3, 1 C.F.R. § 305.86-3 (1991).