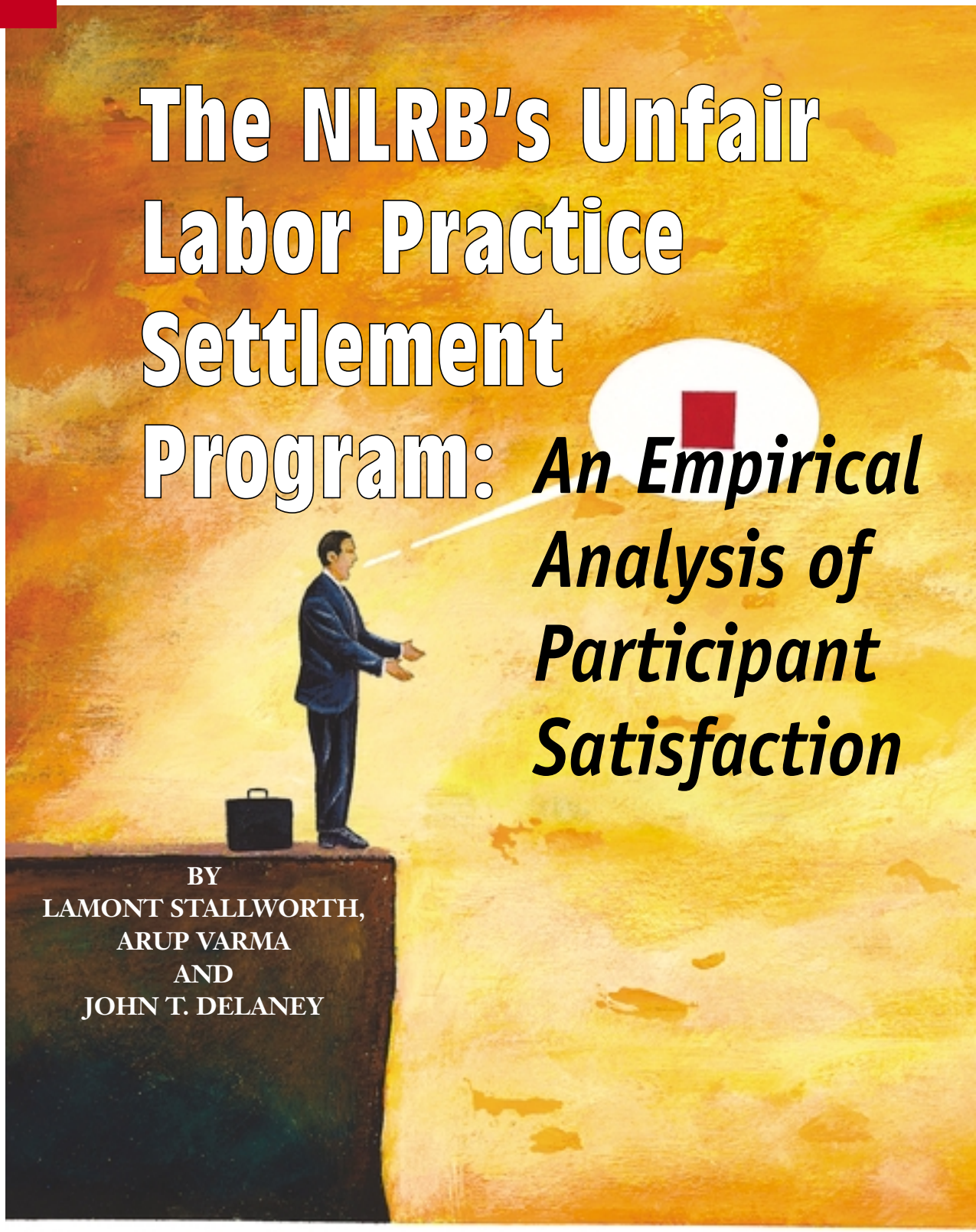
The NLRB's Unfair Labor Practice Settlement Program: *An Empirical Analysis of Participant Satisfaction*



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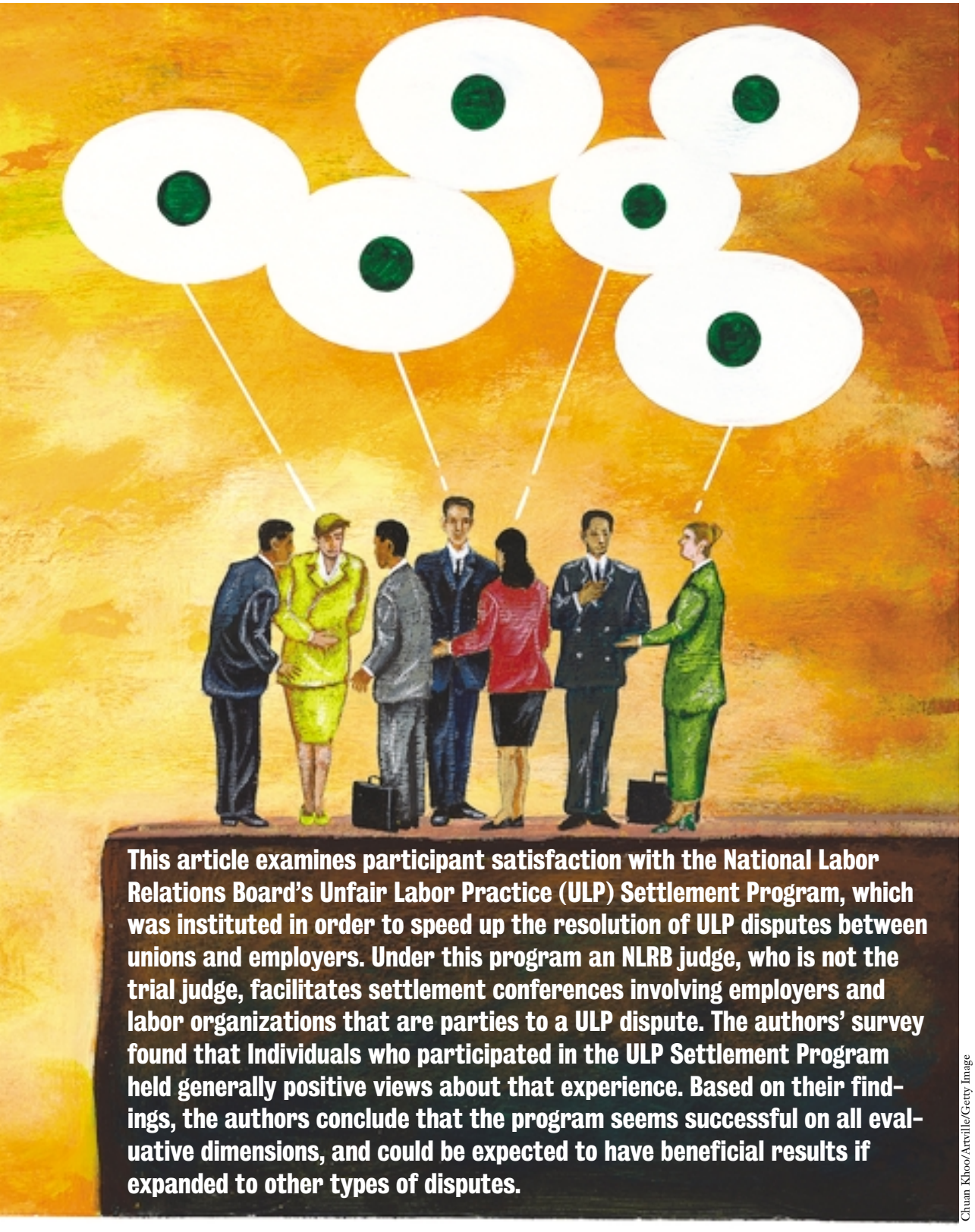
For more than a century, unions and employers in the United States have had a stormy relationship. The National Labor Relations Act (NLRA)[1] created the National Labor Relations Board (NLRB) in part to stabilize labor-management relations by facilitating the collective bargaining process between unions and employers. The NLRA's broad, remedial purpose, as stated in Section 1, is to eliminate imbalances in bargaining power and ensure that the process by which such agreements are reached are fair and equitable.[2] However, over the years, attempts to solve these labor-management disputes have remained emotional and bitterly contested.

Historically, the NLRB's practice has been to



This article examines participant satisfaction with the National Labor Relations Board's Unfair Labor Practice (ULP) Settlement Program, which was instituted in order to speed up the resolution of ULP disputes between unions and employers. Under this program an NLRB judge, who is not the trial judge, facilitates settlement conferences involving employers and labor organizations that are parties to a ULP dispute. The authors' survey found that Individuals who participated in the ULP Settlement Program held generally positive views about that experience. Based on their findings, the authors conclude that the program seems successful on all evaluative dimensions, and could be expected to have beneficial results if expanded to other types of disputes.

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fully litigate union-management disputes before administrative law judges in lengthy, complex legal proceedings.[3] The supposedly simple process of determining whether employees wish to be represented by a labor organization and, if so, bargain a contract, has become anything but simple. Instead, the process of collective bargaining, and the public policy governing it, has evolved into a complicated administrative and legal process. For instance, the basic handbook, *The Developing Labor Law*, has 1,900 pages dealing with legal doctrine under the NLRA, followed by a table of cases that runs for an additional 300 pages.[4] In general, this approach has resulted in trials lasting more than three days on average. It has also instilled in both parties the

view that post-hearing briefs are an absolute right and written decisions are the only appropriate means of deciding a case.[5] Undoubtedly, the result of this system is a two-edged sword for management and unions. For example, it has promoted antagonistic interplay between labor and management and minimized the idea that voluntary dispute resolution by both parties is possible.

The ULP Settlement Judge Program

On Feb. 1, 1995, the NLRB modified its rules in an attempt to change this situation.[6] For the first time in its history, the Board gave its judges special authority to serve as settlement judges in unfair labor practice (ULP) cases (referred to here as the settlement judge rule).[7] With this change, the ULP settlement program of the NLRB was born, challenging a long-standing adversarial legal culture.

Specifically, the settlement judge rule allows a judge "other than the trial judge" to be assigned to a case "to conduct settlement negotiations" in instances in which all parties agree to participate.[8] The ULP settlement judge program enables judges to resolve many disputes quickly and informally, thereby avoiding long and costly litigation. For example, in 1997, the NLRB estimated that the average fully-litigated case cost $35,000 in appropriated funds, and that the ULP settlement judge program had saved the agency about $2.3 million annually since its inception.[9]

In addition, this program increased the productivity of judges. During its first two years, judges increased their settlements by about 15% annually and reduced the median lag time from close of trial to issuance of decision from 138 days to 112 days. Significantly, these improvements were achieved during a period when the NLRB caseload was steady and the number of judges fell by 20%.[10]

The Present Study

This study provides information about the disputants' experiences under the ULP settlement judge program.[11] This information provides an indication of the success of the program and some insight into its applicability in other settings. It is important to understand the effectiveness of such programs—especially from the perspective of the individuals who participate in them—because U.S. courts have embraced alternative dispute resolution (ADR) as a means of reducing litigation.

Background

The investigation began late in 1997 after a chance conversation between the authors and NLRB Chairman William B. Gould IV. That conversation led to a formal meeting in Washington, D.C., with several NLRB officials. The authors followed up by filing a request under the Freedom of Information Act (FOIA), seeking information on the ULP settlement judge program.[12] Subsequently, they created a study design aimed at providing a broad assessment of this program. Although many NLRB officials encouraged the research project, the authors maintained complete control over the project, which was conducted using their private research funds, and partial funding from the Center for Employment Dispute Resolution, and the University of Iowa. Neither the NLRB nor the federal government financially supported this study.

Research Design and Method

In response to the author's FOIA request, the NLRB provided a listing of cases involving settlement judges and information on case outcomes. This enabled the authors to examine all ULP cases assigned to settlement judges from the inception of the ULP settlement program on

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Feb. 1, 1995 through June 30, 1998. During this period, 306 cases were assigned to settlement judges and 189 resulted in settlements (a 62% settlement rate).

In order to obtain information for the survey concerning participant satisfaction, the authors read the public case files for each case. This enabled them to identify the unions involved, the date on which initial ULP charges were filed and the nature of the dispute. The "notice sheets" in the case files provided valid names and addresses of 431 individuals (parties and their representatives). The authors then sent these individuals a letter asking them to participate in the study, followed by a second letter containing a brief questionnaire, and then a third, follow-up letter. The questionnaire focused on process-related factors and the disputants' satisfaction with their ULP settlement conference experience. One hundred and nineteen disputants responded to the questionnaire, representing a response rate of about 28%.

Results

Disputants' perceptions of the ULP settlement conference process

The results reported in Table 1 in large part indicate that the disputants who participated in the ULP settlement judge program held positive views about their experiences. For example, on a five-point Likert scale (5=strongly agree; 3=neither agree nor disagree, and 1=strongly disagree), there was general agreement that

Table 1: Participants' Perceptions of Conference Process

Variable/Question	Mean (m)	Standard Deviation
The settlement conference was fair (1=strongly disagree; 5=strongly agree)	3.76	0.99
The settlement judge seemed impartial (1=strongly disagree; 5=strongly agree)	3.86	0.92
The settlement judge understood my views (1=strongly disagree; 5=strongly agree)	3.69	0.98
The settlement conference provided a good opportunity for my views to be expressed (1=strongly disagree; 5=strongly agree)	3.57	1.05
The relationship between the parties was very cooperative in this dispute (1=strongly disagree; 5=strongly agree)	2.31	1.11
There was a high level of trust between the parties in this dispute (1=strongly disagree; 5=strongly agree)	2.06	1.00
The settlement conference was not too formal or too informal (1=strongly disagree; 5=strongly agree)	3.80	0.83
The settlement conference outcome was favorable to my side (1=strongly disagree; 5=strongly agree)	2.99	1.10
The outcome of the case was close to what I expected when it began (1=strongly disagree; 5=strongly agree)	3.18	1.11
There was a great disparity in the positions between the disputants (1=strongly disagree; 5=strongly agree)	3.78	1.04
There was no personality conflict between the parties' advocates (1=strongly disagree; 5=strongly agree)	3.15	1.15
This case involved a very complex dispute (1=strongly disagree; 5=strongly agree)	2.89	1.21
This case involved complex legal issues (1=strongly disagree; 5=strongly agree)	2.81	1.17
Number of employees at the dispute site	390	895
Person-hours spent by organization's attorneys on this dispute	60.2	90.2
Person-hours spent by others in the organization on this dispute	81.7	146.1

1. the settlement conference was fair (m=3.76),
2. the settlement judge seemed impartial (m=3.86),
3. the settlement judge understood the disputants' views (m=3.69), and
4. the settlement conference provided a good opportunity for the disputants' views to be expressed (m=3.57).

These results are worth noting, given that the disputants reported low scores on two other key questions: (1) the level of cooperation between the parties (m=2.31); and (2) the level of trust between the parties (m=2.06). It is heartening to note that the disputants perceived the ULP settlement conference to be fair and impartial, in spite of low levels of trust and cooperativeness between them. This bodes well for the acceptance of the settlement conference as a means of resolving workplace disputes.

Respondents' perceptions of settlement conference outcomes

Table 2 reports the results of the authors' survey questionnaire addressing the disputants' perceptions of the outcomes of the ULP settlement conferences. In general, the findings in Table 2 suggest overall satisfaction with the outcomes (m=3.25). Not surprisingly, the satisfaction level was stronger for respondents who reached a settlement (m=3.54) than for respondents whose cases did not settle (m=2.83). Further, respondents also were generally satisfied with the amount of information that was provided to them about the nature of a ULP settlement conference (m=3.26), as well as with the opportunity to present their side of the dispute (m=3.58). They were also fairly positive about the settlement judge's knowledge of the substance of their dispute (m=3.47), the judge's skill at working with the parties to reach a settlement (m=3.41), and the overall performance

Table 2: Participants' Perceptions of Conference Outcome

VARIABLE/QUESTION	Mean (m)	STANDARD DEVIATION
How satisfied were you with…		
the outcome of your case (1=very dissatisfied; 5=very satisfied)	3.25	1.23
the amount of information you were given about the nature of a settlement conference? (1=very dissatisfied; 5=very satisfied)	3.26	0.97
the opportunity you had to present your side of the dispute? (1=very dissatisfied; 5=very satisfied)	3.58	0.97
how knowledgeable the judge was about the substance of your dispute? (1=very dissatisfied; 5=very satisfied)	3.47	1.04
the settlement judge's skill at working with the parties to reach a settlement? (1=very dissatisfied; 5=very satisfied)	3.41	1.06
the overall performance of the settlement conference (1=very dissatisfied; 5=very satisfied)	3.27	1.12
I would recommend that others use settlement conferences (1=strongly disagree; 5=strongly agree)	3.65	0.99
If it were possible, I would use this particular settlement judge again (1=strongly disagree; 5=strongly agree)	3.33	1.14
The settlement conference was held at the right time (1=strongly disagree; 5=strongly agree)	3.27	0.95
Using a settlement conference saved organizational resources (1=strongly disagree; 5=strongly agree)	3.29	1.22
Participating in a settlement conference improved subsequent labor-management relations (1=strongly disagree; 5=strongly agree)	2.40	1.01
What is the likelihood you would be willing to use a settlement conference in the future to address a new dispute (1=very unlikely; 5=very likely)	3.69	1.11

Table 3: Participants' Satisfaction with Conference (settlement vs. no settlement)

Variable/Question	Mean (m)	Standard Deviation
1. If the settlement conference led to a settlement …		
How satisfied were you with the settlement? (1=very dissatisfied; 5=very satisfied)	3.42	1.12
How satisfied were you with the amount of time it took to reach a settlement? (1=very dissatisfied; 5=very satisfied)	3.62	1.01
How satisfied were you with the amount of time all NLRB processes took? (1=very dissatisfied; 5=very satisfied)	2.38	1.04
2. If the settlement conference led to no settlement …		
Participating in the settlement judge program was a useful experience (1=strongly disagree; 5=strongly agree)	3.08	1.22

of the settlement conference (m=3.27).

Finally, the responses suggest that respondents would be more likely to use a ULP settlement conference in the future to address a new dispute (m=3.69) and recommend the process to others (m=3.65).

Table 3 compares the perceived satisfaction with the ULP settlement conference program of respondents who participated in cases that settled with respondents who participated in cases that did not. Overall, the findings showed that respondents were satisfied when their settlement conference led to a settlement (m=3.42). Among the respondents who reached a settlement, some were satisfied with the amount of time the ULP settlement conference took (m=3.62) while others were generally dissatisfied with how long the processes took (m=2.38). Respondents who did not reach a settlement reported a neutral response when asked whether the ULP settlement judge program was a useful experience (m=3.08). As one might expect, respondents who obtained what they considered to be a favorable outcome expressed more favorable views (m=4.03) than did individuals who perceived a neutral or negative outcome (m=3.00).

Factors influencing the use of ULP settlement conferences

The questionnaire asked the respondents several questions designed to determine the factors that would influence the respondents to use the ULP settlement judge program to resolve disputes. As can be seen in Table 4, the costs of litigation (m=3.28), the costs of prolonging a dispute (m=3.56), and the strengths and weaknesses of a case (m=3.55) were each important factors in deciding whether to participate in a settlement conference. On the other hand, an organization's financial situation (m=3.07), the likelihood that damaging evidence would be uncovered (m=2.48), the specific NLRB judge who would hear the case (m=2.65), and the desire to avoid federal court (m=2.19) were not as important. While, on average, respondents did not seem to place much weight on the latter four issues, some indicated that these factors were critically important in the process of deciding whether to take part in a settlement conference.

Discussion

This study focused on the perceptions of disputants who participated in the NLRB's ULP settlement judge program. Overall, the results suggest that the disputants were satisfied with the program. The authors believe that the results of this study show that the ULP settlement judge program is an effective and valuable initiative, one that is supported by the constituencies it serves. Further, we also believe that an expansion of the program would likely produce positive results. There are several potential explanations for this assessment.

The Growth and Popularity of ADR

There has been a growing focus, particularly in recent years, on ADR methods, such as arbitration, mediation and other informal processes, that are an alternative to a trial.[13] The organizational and individuals proponents of ADR share the widely-held belief that these processes are more efficient and accessible than the complicated judicial system.[14] For instance, McDermott's 1995 examination of 336 *Fortune* 500 companies

indicated that ADR was attractive to the majority of organizations and to 90% of the individual disputants.[15] Indeed, most organizations in his study were considering implementing peer review or mediation. Moreover, 78% of them indicated that they were willing to allow an outside arbitrator to resolve their company's employment law disputes. Similarly, Platau concluded from a case study that his subjects were able to avoid a lengthy and costly discovery process by using mediation.[16] With the growing need to reduce litigation costs, both employers and employees have undoubtedly become more familiar with ADR and its different forms.

Given these views, and the perception that the ULP settlement judge program will reduce the problem of cost and delay, this program should be viewed in a favorable light, particularly by employers. The authors suspect that this type of ADR program could do a better job of bringing workplace justice to people at a lower cost and with greater speed, relative to the traditional NLRB process. In some cases, ADR has been a tool for settling disputes over collective bargaining agreements, generally using some form of mediation to resolve rights-based disputes.[17] Following the development of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship,[18] which assures due process for individuals with complaints based on a statute, ADR is being used to resolve disputes claiming violation of discrimination laws, safety regulations and whistleblower legislation. Thus, ADR has become an effective tool to resolve disputes that do not involve union representation and collective bargaining agreements.

The ULP Process Strongly Mirrors the Arbitration Process

Arbitration is one of the most widely known and used forms of ADR. Any civil case can be arbitrated through court-annexed arbitration, or under the terms of a pre-dispute arbitration agreement or an agreement reached after a dispute has arisen. Arbitration hearings are usually more informal than court proceedings and judicial rules of evidence do not apply.[19]

The ULP settlement conference offers an informal hearing (similar to that in arbitration) and an open-ended process. These features could stimulate the disputants to resolve their differences.

The results of this study indicate that the parties to the ULP settlement judge program were satisfied because they had greater control over the process and the outcome of their dispute relative to existing government processes. Historically, this has been an underlying positive assumption of the basic tenet of arbitration.[20]

ADR Programs Improve Employee Morale and Productivity

When the ADR process itself is part of the sys-

Table 4: Factors Used by Parties in Decision to Use Settlement Conference

Variable/Question	Mean (m)	Standard Deviation
Indicate the amount of weight you normally put on the following factors in deciding whether or not to use a settlement conference:		
Costs of litigation (1=very little weight; 5=very much weight)	3.28	1.10
Costs of prolonging the dispute (1=very little weight; 5=very much weight)	3.56	1.01
Strengths and weaknesses of the case (1=very little weight; 5=very much weight)	3.55	0.92
Organization's financial situation (1=very little weight; 5=very much weight)	3.07	1.09
Likelihood that damaging evidence would be uncovered (1=very little weight; 5=very much weight)	2.48	1.06
The NLRB judge who would hear the case (1=very little weight; 5=very much weight)	2.65	1.13
The desire to avoid federal court (1=very little weight; 5=very much weight)	2.19	1.12

temic structure of the organization, it can influence employee behavior.[21] Employees who are satisfied with the process are less likely to sue, and regulatory agencies may be less inclined to pursue a complaint from an employee who has taken the dispute through a credible employer ADR process.[22]

In fact, more courts now recognize the use of ADR, sometimes prohibiting claims from going forward until the employer's ADR process has been completed. According to Choudhury, the primary reason for low productivity in the workplace is a lack of communication among employees, supervisors and managers. The reason is that the lack of communication interferes with their ability to work together as a team. Consequently, unless addressed, it can lead to mistrust and diminished productivity.

A broad ADR program can address morale problems by creating a forum for employees to raise and resolve breakdowns in communications before they adversely affect their relationship and disrupt production or evolve into a lawsuit. Just as important, such a program can help create a culture where employees feel safe to disagree in ways that create productive synergy.

Generally, an organization should adopt an ADR program if it has been subjected to a costly employment lawsuit in the past or is particularly vulnerable to them because of an urban location, a diverse work force, or a high turnover rate.[24] (A high turnover rate usually means a company has disgruntled employees whose discontent could be contagious.) By making the ADR process a part of the corporate structure, the organization may be able to improve employee morale and productivity.

This reasoning should apply as well to the ULP settlement judge program and encourage other government agencies to use similar programs. If they do, this study suggests that they would likely see more settlements, lower costs, speedier final outcomes, and positive ratings by the participants in the program. At a time when the cost of government and the quality of its services are regularly debated, an extension of the ULP settlement judge program should be seriously considered. ■

ENDNOTES

[1] 29 U.S.C. §§ 151-169. See, Taft-Hartley Labor Act of 1947.

[2] Jerry Hunter, "The NLRB and Non-Union Workers," 50 (4) *Disp. Resol. J.* 18-22 (Oct.-Dec. 1995).

[3] John F. O'Connell, "The NLRB at the Grassroots," 22 (4) *J. Labor Res.* 761-775 (2001).

[4] Richard R. Block, "Reforming Labor Law," *USA Today*, vol. 127 no. 2646, at 54-6 (March 1999).

[5] David B. Parker "Administrative Law Judge Reform." Unpublished proposal to the Ford Foundation (1997)

[6] 60 Fed. Reg. 61680.

[7] William B. Gould IV, NLRB Three Year Report, available at www.nlrb.gov/press/r2202.html. See, Parker *supra* n. 5.

[8] 60 Federal Register 61679.

[9] Parker *supra* n. 5.

[10] *Id.* n. 5

[11] The original research design for this study included questions to assess both disputants' and judges' perceptions of the program. However, in this article, we only discuss information provided by disputants.

[12] See Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides individuals with a right to access records in the possession of the federal government. The government may withhold information pursuant to the nine exemptions and three exclusions contained in the Act.

[13] Evan Spelfogel, "New Trends in the Arbitration of Employment Disputes," 48 (1) *Arbitration J.* 6-16 (Jan. 1993). And see James Alfini, "Dispute Resolution Alternatives: What We Know and What We Need to Know," 82 (3) *Ill. Bar J.* 130 (1994).

[14] Amrapali Choudhury, "What the User Wants and Needs Out of ADR," 67 *J. Institute of Arbitrators* (Part 4) 317-320 (2001).

[15] E. Patrick McDermott. "Survey of 92 Key Companies Using ADR to Settle Employment Disputes," 50 (4) *Disp. Resol. J.* 8-13 (Oct.-Dec. 1995).

[16] Steven M. Platau, "When ADR Works for the CPA: Solve Disputes Before Costs Grow," 186 (3) *J. Accountancy* 80 (1998).

[17] Arnold Zack & Michael T. Duffy, "ADR and Employment Discrimination: A Massachusetts Agency Leads the Way," 51 (4) *Disp. Resol. J.* (Oct. 1996).

[18] See, *e.g.*, "Designing Integrated Conflict Management Systems: Guidelines for Practitioners and Decision Makers in Organizations," A Report Proposed by the Society of Professionals in Dispute Resolution, published in Cornell Studies in Conflict and Dispute Resolution No. 4. (Cornell/PERC Institute on Conflict Resolution, 2001). Also see "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationships" (May 9, 1995) available at www.adr.org and at www.abanet.org/Labor/protocol.html

[19] Bruce Meyerson & John M. Townsend, "Revised Code of Ethics for Commercial Arbitrators Explained," 59 (1) *Disp. Resol. J.* 10-17 (Feb.-April 2004).

[20] Cynthia E. Cohen & Murray E. Cohen, "Relative Satisfaction with ADR: Some Empirical Evidence," 57 (4) *Disp. Resol. J.* 36-41 (Nov. 2002-Jan. 2003).

[21] Kirk Blackard, "How To Make the Most of the Employment ADR Process," 54 (2) *Disp. Resol. J.* 71-77 (May 1999).

[22] Maureen M. Gallagher, "ADR Slices Litigation Costs, Enhance Morale," 71 (9) *HR Focus* (1994).

[24] *Supra* n. 14.