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NLRB REMEDIES FOR UNDOCUMENTED WORKERS

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This article examines the National Labor Relations Board's (NLRB's) remedial power with respect to undocumented aliens in light of the Immigration Reform and Control Act of 1986 (IRCA),[1] which strengthened federal statutory policy against the hiring and retention of undocumented workers. The NLRB's traditional remedies for employer unfair labor practices include reinstatement and back pay for discriminatees.[2] In cases involving employer or union threats which interfere with employee free choice in the organizational setting, the Board will set aside election results and order a new election under "laboratory" conditions to remedy the unfair labor practices.[3] Where the employer's unfair labor practices have been egregious and pervasive such that a fair election cannot be held, the Board will issue an order for the employer to bargain with the union based upon the union's prior obtainment of authorization cards from a majority of the employees in the appropriate bargaining unit.[4]

It is clear that the NLRB deems threats by union adherents to undocumented workers, *e.g.*, that the union will call the Immigration and Naturalization Service (INS) if the union loses an election, as serious enough to interfere with free choice such that the Board will order a new

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[1] 8 U.S.C.A. §§ 1324a-1357 (West Supp. 1988).

[2] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 4 Lab. Cas. (CCH) ¶ 51,210 (1941).

[3] *General Shoe Corp.*, 77 N.L.R.B. 124 (1948).

[4] NLRB v. Gissel Packing Co., 395 U.S. 575, 60 Lab. Cas. (CCH) ¶ 10,150 (1968), *reh'g denied*, 396 U.S. 869 (1969).

election.[5] The Union violates Section 8(b)(1)(A) of the National Labor Relations Act (NLRA) if it threatens employees during the election campaign with calls to the INS if the union loses.[6] The NLRB also found a Section 8(b)(1)(A) violation in *Westside Hospital*[7] when a union organizer threatened an employee with deportation unless he signed an authorization card for the union. And in *Puturamik Industries*,[8] an election was set aside by the Board because of an employee's threats to contact the INS if the employees *chose* union representation where the employee had apparent authority to act for the employer.

CASE LAW

Presently, there are two leading court cases involving employer threats of deportation to union-supporting employees.[9] The timing of this employer tactic is usually just before or after an election.[10] The employer seeks to avoid unionization or retaliate against union supporters by threatening INS deportation of undocumented aliens.[11] Judicial review of such actions has thus far been confined to pre-IRCA cases[12] in which the courts relied solely upon the provisions of the NLRA and the Immigration and Naturalization Act (INA) to construe the parties' rights.[13]

[5] *Crown Coach Corp.*, 284 N.L.R.B. No. 111, at 4 (1987).

[6] *Teamsters, Local 748*, 246 N.L.R.B. 758 (1979).

[7] 218 N.L.R.B. 96 (1975).

[8] 279 N.L.R.B. 185; 121 L.R.R.M. 1314 (1986).

[9] *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 101 Lab. Cas. (CCH) ¶ 11,042 (1984), Local 512 v. NLRB (Felbro), 795 F.2d 705, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986).

[10] *See generally* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886-87, 101 Lab. Cas. (CCH) ¶ 11,042 (1984) (employer's threatening remarks addressed to undocumented aliens two hours after election), Local 512 v. NLRB, 795 F.2d 705, 709, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986) (employer unfair labor practices committed immediately before and just after election), *Caamano Bros., Inc.*, 275 N.L.R.B. 205, 206, 119 L.R.R.M. 1062 (1985) (employer fired two employees directly following demand for union recognition).

[11] *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 887, 101 Lab. Cas. (CCH) ¶ 11,042 (1984) (following election employer learned many union employees lacked valid immigration papers and requested INS investigation).

[12] The Immigration Reform and Control Act (IRCA) was signed into law by President Reagan on November 5, 1986, and is codified at 8 U.S.C.A. § 1324 (West Supp. 1988). *Sure-Tan* and *Local 512* were both decided before IRCA became law. *See supra* note 9 and accompanying text (discussing cases on employer threats of deportation). There has been a district court decision relating to the post-IRCA effect of employer discriminatory discharges. *See* League of United Latin Amer. Citizens v. Pasadena Indep. School Dist., 662 F. Supp. 443, 451, 43 E.P.D. (CCH) ¶ 37,098 (S.D. Tex. 1987) (Court granted workers relief from employer discrimination where they were clearly eligible for amnesty pursuant to IRCA provisions).

[13] The NLRA's purpose is to protect rights of employees to choose to organize and bargain

In *Sure-Tan Inc., v. NLRB*,[14] the United States Supreme Court considered whether NLRA protections applied to an employer's threats to its undocumented alien workers[15] which occurred just hours after the election in which the union prevailed.[16] Although the employer knew months in advance that most of its employees were illegal aliens, the employer reported their presence to the INS only after the election.[17]

The NLRB affirmed the Administrative Law Judge's (ALJ's) conclusion that the employer violated the NLRA sections 8(a)(1) and 8(a)(3) by constructively discharging the undocumented alien employees.[18] The Board ordered the remedies of reinstatement with back pay.[19] The Court of Appeals for the Seventh Circuit agreed with the Board's conclusions, but modified the order and provided for broader reinstatement rights with at least six months' back pay.[20]

The Supreme Court made the threshold determination that the employer unfair labor practices committed against undocumented workers were within the jurisdiction of the NLRA both because of the Act's broad definition of "employee," and because of the NLRB's interpretation of undocumented workers as employees.[21] The Court concluded to treat undocumented aliens as protected employees furthered the goals of the NLRA and did not offend the policies of the INA.[22] The finding

collectively. *See* 19 U.S.C.A. §§ 151-69 (West 1973 & Supp. 1988). Congress enacted the INA to address the terms and conditions of admission of aliens to the United States. *See* 8 U.S.C.A. §§ 1101-03, 1181-84 (West 1970 & Supp. 1988).

[14] 467 U.S. 883, 101 Lab. Cas. (CCH) ¶ 11,042 (1984), *see infra* notes 59-77 and accompanying text (discussion of plurality opinions).

[15] *Id.* at 891.

[16] *Id.* at 886. *Cf.* note 10 and accompanying text (discussing context of employer threats).

[17] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 887, 895-96, 101 Lab. Cas. (CCH) ¶ 11,042 (1984). The Court agreed with the finding that the employer's anti-union animus was the proximate cause of the INS deportation proceedings. *Id.*

[18] *Id.* at 888.

[19] *Id.* at 888-89.

[20] *Id.* at 889-90.

[21] *Id.* at 891-92. *See also* NLRB v. Apollo Tire Co., 604 F.2d 1180, 1182, 86 Lab. Cas. (CCH) ¶ 11,523 (9th Cir. 1979) (NLRA defines "employee" broadly not including aliens in its exemptions, and Board consistently interprets employees to include aliens).

[22] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 892-93, 101 Lab. Cas. (CCH) ¶ 11,042 (1984). *See generally* DeCanas v. Bica, 424 U.S. 351, 356-60, 78 Lab. Cas. (CCH) ¶ 53,798 (1976) (protecting aliens promotes union effectiveness and INA concerned with admission, rather than employment of aliens). *But see* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 913, 101 Lab. Cas. (CCH) ¶ 11,042 (1984) (Powell, J., dissenting) (unlikely that illegal aliens are NLRA "employees" since such aliens are wanted for violation of United States criminal laws and deserve no remedy).

of the Court of Appeals that the employer committed unfair labor practices when it reported the workers to the INS to retaliate for their union support was affirmed.[23]

The Supreme Court reversed in part the Seventh Circuit's order and remanded to the NLRB.[24] The Court reasoned that the NLRB has primary responsibility to fashion remedies subject to limited judicial review.[25] The Supreme Court did set forth remedial principles as guidance for the Board.[26] A back pay order, noted the Court, may remedy only actual, rather than speculative effects of unfair labor practices.[27] The Court addressed the question of reinstatement, and concluded that such a remedy must be conditioned upon the employees' legal re-entry into the United States.[28]

The Ninth Circuit decided a similar case four months prior to the enactment of IRCA.[29] *Local 512 v. NLRB* (Felbro) also arose in the context of employee selection of a bargaining agent.[30] The employer sought to sabotage union activities, and through a series of events both before and after the election, violated the NLRA.[31] The NLRB modified the ALJ's remedial order based upon its interpretation of *Sure-Tan*, and conditioned the discriminatee's back pay award upon legality of their presence in the United States.[32] The question of reinstatement was not reached because the employer voluntarily reinstated the workers.[33]

[23] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 895-96, 101 Lab. Cas. (CCH) ¶ 11,042 (1984).

[24] *Id.* at 898-906.

[25] *Id.* at 898-99. The Court cautioned courts of appeal not to substitute their judgment for the Board's in trying to undo the effects of unfair labor practices. *Id.* at 899.

[26] *Id.* at 900-06. The Court noted that remedies must be tailored to the unfair labor practices intended to be redressed. *Id.* at 900. *See also id.* at 901 (Board must effectuate general reparative polices of NLRA).

[27] *Id.* at 900. The Court reaffirmed the legitimacy of a back pay order only to the extent it represents *actual* consequences of unfair labor practices. *Id.* (Emphasis added.) *Cf.* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 198, 4 Lab. Cas. (CCH) ¶ 51,120 (1941) (only actual losses should be recovered).

[28] Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 902-06, 101 Lab. Cas. (CCH) ¶ 11,042 (1984) (remedies conditioned upon legal readmittance to United States so as not to conflict with INA policies of deterring unauthorized immigration). Since the employees were in Mexico and unable to lawfully re-enter the United States, they received protection as "employees" under the NLRA and INA, but were denied remedies. *Id. See id.* at 906-13 (Brennan, J., concurring).

[29] Local 512 v. NLRB, 795 F.2d 705, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986).

[30] *Id.* at 709. *See supra* note 10 and accompanying text (discussing employer tactics).

[31] Local 512 v. NLRB, 795 F.2d 705, 709, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir., 1986).

[32] *Felbro, Inc.*, 274 N.L.R.B. 1268, 1269, 1283-84.

[33] Local 512 v. NLRB, 795 F.2d 705, 709-10, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986).

On petition for review and enforcement before the Ninth Circuit, the Court considered whether undocumented aliens who remained in the United States throughout the back pay period were entitled to back pay awards.[34] The Ninth Circuit held that the undocumented workers were entitled to back pay,[35] reasoning that such a remedy "promotes the underlying aims of the NLRA and does not detract from the INA."[36] It has been reported that the employer is appealing the decision of the Court of Appeals.[37] The Ninth Circuit remanded the case to the NLRB and they have yet to issue a modified order, perhaps because the enactment of IRCA has clouded the issue,[38] or perhaps because, as the NLRB's General Counsel stated in a recent memorandum, the Board has not acquiesced to the Ninth Circuit's position.[39]

Both the *Sure-Tan* and *Local 512* Courts decided cases in an attempt to reconcile NLRA and INA provisions.[40] With the enactment of IRCA, the equation is significantly changed because IRCA makes it unlawful for employers to hire (after Nov. 6, 1986) or continue to employ undocumented aliens (who were unlawfully hired after Nov. 6, 1986).[41] It is therefore now illegal to engage in such an employment relationship which heretofore the courts protected.[42] Courts have not yet been called

[34] *Id.* at 719. The Court neatly contrasts this case with *Sure-Tan*, in which the discriminatees were denied back pay since they were unable to re-enter the United States legally. *Id.*

[35] *Id.* at 720. *But see id.* at 723-27 (Beezer, J., dissenting) (*Sure Tan* mandates proof of legal immigration status before back pay awarded).

[36] *Id.* at 722. *See supra* note 13 and accompanying text (discussing purposes of INA and NLRA).

[37] *See* Solis, *Rebuilding Drive: Their Ranks Eroded. Unions Try to Recruit Illegal Immigrants*, Wall St. J., Oct. 15, 1986 at 23, col. 1 (employer plans to appeal back pay awards to United States Supreme Court).

[38] Local 512 v. NLRB, 795 F.2d 705, 722, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986). *See supra* note 29 and accompanying text (discussing enactment of IRCA).

[39] *See* R. Collyer, Reinstatement and Backpay Remedies for Discriminatees Who are 'Undocumented Aliens,' Memorandum GC 88-9, Sept. 1, 1988 at 1-2, n. 2 (Board disagrees with *Local 512* Court's reinstatement and back pay remedies for undocumented aliens present in United Staes). *See also infra* notes 49-57, 94, 96, 100 and accompanying text (discussing General Counsel's memorandum).

[40] *See supra* note 13 and accompanying text (discussing pre-IRCA cases).

[41] *See* 8 U.S.C.A. § 1324 (West Supp. 1988). Indeed, Congress provided stiff penalties for violations of IRCA. *Id.* Violators are subject to a series of graduated fines, and possible imprisonment. *Id.*

[42] *See supra* note 41 and accompanying text (discussing IRCA provisions making illegal the practice of employing undocumented aliens). *See also* Local 512 v. NLRB, 795 F.2d 705, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986). *Cf.* Patel v. Quality Inn South, 846 F.2d 700, 705 (11th Cir. 1988) (undocumented aliens covered under Fair Labor Standards Act in spite

upon to interpret the NLRA, INA, and IRCA in an employer unfair labor practice case against undocumented aliens who were hired after Nov. 6, 1986, but it is entirely possible that they will depart from the standard set by the Ninth Circuit in *Local 512*,[43] because that case involved employees hired prior to Nov. 6, 1986.

Because one of the purposes of IRCA is to prevent employment of undocumented workers and consequently deter illegal immigration of unauthorized aliens,[44] the remedies granted in *Local 512* pursuant to the NLRA represent a degree of protection for undocumented workers which creates more conflict with IRCA than it did with the INA. Under the INA, employment of an illegal alien specifically did not constitute the felony of harboring,[45] whereas IRCA makes such employment unlawful and prescribes civil and criminal penalties for employers who fail to comply with documentation requirements and who knowingly hire undocumented aliens after Nov. 6, 1986.[46] Although the NLRB has a duty to accommodate other statutory schemes in issuing remedial orders,[47] the Board has at times prioritized protection of concerted activity over other laws in the past.[48]

NLRB General Counsel Memorandum

In a September 1988 memorandum,[49] Rosemary M. Collyer, the National

of IRCA provisions); *Note: Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 Minn. L. Rev. 900 (1988) (Courts should not conclude that IRCA ends all federal labor law protection for illegal aliens because *Sure-Tan's* principles remain fully relevant and IRCA's legislative history supports continued extension of both FLSA and NLRA rights).

[43] *See supra* notes 35-36 and accompanying text (discussing *Local 512* holding and rationale). The NLRB position represented in the General Counsel's memorandum is also entitled to great weight. *See supra* note 25 and accompanying text (discussing deference courts pay to agency decisions). *Cf.* League of United Latin Amer. Citizens v. Pasadena Indep. School Dist., 662 F. Supp. 443, 446-51, 43 E.P.D. (CCH) ¶ 37,098 (S.D. Tex. 1987) (district court granted preliminary injunction prohibiting employer discrimination against undocumented aliens in spite of IRCA provisions).

[44] *Note, The National Labor Relations Act and Undocumented Workers: Local 512 v. NLRB after the Immigration Reform and Control Act of 1986*, 62 Wash. L. Rev. 595, n.3 (1987).

[45] NLRB v. Apollo Tire Co., Inc., 604 F.2d 1180, 1183, 86 Lab. Cas. (CCH) ¶ 11,523 (9th Cir. 1979).

[46] Immigration Reform and Control Act of 1986, 8 U.S.C.A. §§ 1324a(a)(1), (e)(4), a(f). *See generally* (CCH), New 1986 Alien Employment Controls With Law and Explanation (1986).

[47] *Id.* at 597, *citing* Southern Steamship Co., v. NLRB, 316 U.S. 31, 47 (1942).

[48] *Apollo Tire Co.*, 236 N.L.R.B. 1627 (1978) (NLRB excluded evidence of undocumented status of employees who were charging respondent employer with unfair labor practices.)

[49] R. Collyer, *supra* note 39.

Labor Relations Board's General Counsel, provided guidance to the Regional Directors, Officers-in-Charge and Resident Officers of the Board on the issue of remedies for discriminatees where an employer maintains that the discriminatees are undocumented aliens. The General Counsel appropriately divided her advice between those employees hired on or before November 6, 1986 and those hired after November 6, 1986, the date of the Immigration Reform and Control Act of 1986.[50] Because the employer penalty provisions only apply to employees hired after November 6, 1986, the General Counsel directed the regions to ignore an employer's argument that the remedy of reinstatement for an employee hired on or before November 6, 1986, who has refused to complete an employment eligibility verification form, commonly referred to as the Form I-9 (as is required by IRCA) would create risk of criminal sanctions against the employer.[51] As far as the consequence of unlawful termination on the employee's status is concerned, the memorandum noted that applicable INS regulations do not deem such a reinstated employee to have suffered an interruption in service.[52]

The General Counsel directs placement of the burden on the employer to prove, by a final INS determination, as opposed to by mere denial of adjustment to lawful temporary resident status (TRS), that the discriminatee is not entitled to be present and employed in the United States.[53] Because IRCA requires that employees hired after November 6, 1986 comply with certain verification procedures, the General Counsel does not advise the regions to require reinstatement and back pay for discriminatees hired past November 6, 1986 who are unable to complete their portion of the I-9.[54] The memorandum attributes this limitation on the NLRB's remedial powers to the Supreme Court's decision in *Sure-Tan, Inc. v. NLRB*,[55] and not to IRCA.[56] Of particular interest with regard to the future direction of the Board's orders is the General Counsel's reference to *Local 512* where she notes that "[t]he Board has not acquiesced to the view of the Ninth Circuit that reinstatement and back

[50] *Supra* note 4.

[51] R. Collyer, *supra* note 39 at 3.

[52] R. Collyer, *supra* note 39 at 3-4. *See also* IRCA, Control of Employment of Aliens, 8 C.F.R. § 274a.2(b) (viii) (E), (G) (1988).

[53] R. Collyer, *supra* note 39 at 4.

[54] R. Collyer, *supra* note 39 at 6 (discussing discouragement of reinstatement for employees unable to complete I-9 form in light of public policy of United States, as expressed in criminal sanction provisions of IRCA).

[55] 467 U.S. 883, 902-03, 101 Lab. Cas. (CCH) ¶ 11,042 (1984).

[56] R. Collyer, *supra* note 39 at 6 (discussing General Counsel's adherence to *Sure-Tan*).

pay are appropriate where the discriminatees are physically, albeit unlawfully, present in the U.S."[57]

FUTURE DIRECTIONS

The most interesting question raised by the foregoing analysis is the direction the Supreme Court will take regarding the issue of remedies for undocumented workers in light of IRCA, and changes in the Court's composition since *Sure-Tan*.[58] In *Sure-Tan*, Justice O'Connor, joined by Justices White and then Chief Justice Burger, generally approved the NLRB's original order which entailed the conventional remedy of reinstatement with back pay (to be determined at the compliance stage based upon facts relating to each discriminatee's individual situation) and the conditioning of any offer of reinstatement upon legal re-entry to the United States to avoid potential conflicts with immigration policies.[59] Justice O'Connor objected to the Seventh Circuit's substitution of its judgment for that of the NLRB.[60] The Court of Appeals for the Seventh Circuit had exceeded its narrow scope of review,[61] in the view of Justice O'Connor, who reversed some of the remedies of the appeals court and remanded to the Board.[62] Justice O'Connor wrote that the undocumented workers were clearly "employees" under the NLRA,[63] and thus entitled to protection from employer constructive discharge.[64] Although the Court's opinion was predicated to some extent on the fact that the employment relationship itself was not illegal,[65] a conclusion which will no longer apply to the undocumented hired after Nov. 6, 1986, some of the policy reasons cited by the Court in support of its decision remain valid despite IRCA. For example, if an employer does not expect to be equally penalized for unfair labor practices against undocumented aliens, this creates an economic incentive to prefer their hire over legally documented employees who can recover back pay.[66]

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens,

[57] R. Collyer, *supra* note 39 at 2, n.2.

[58] *See supra* notes 14-28 and accompanying text (discussing *Sure-Tan* and *Local 512*).

[59] 467 U.S. 883, 902-03, 101 Lab. Cas. (CCH) ¶ 11,042 (1984). Chief Justice Burger has since retired from the Court. The opinion of Justices O'Connor, White and Burger is hereinafter referred to as Justice O'Connor's opinion.

[60] *Id.* at 898-99.

[61] *Id.* at 898.

[62] *Id.* at 890.

[63] *Id.* at 891.

[64] *Id.* at 890.

[65] *Id.* at 892-93.

[66] Id. at 893.

all of whom remain on the Court, partially concurred and partially dissented in *Sure-Tan.*[67] Justice Brennan agreed that undocumented workers are employees under the NLRA and that the employer's report to the INS constituted a Section 8(a)(3) violation.[68] Justice Brennan did not, however, support the remedy issued. Unlike the opinion written by Justice O'Connor, Justice Brennan interpreted the NLRB's acceptance of the modifications made by the appeals court as reason to eliminate a remand.[69] Justice Brennan's dissent objected to the new standard of review detailed in the Court's opinion, a standard which determines "whether the terms of a remedial order are 'sufficiently tailored' to the unfair labor practice it is intended to redress."[70] The usual standard of judicial review with respect to a back pay order of the NLRB is that "the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' "[71] Justice Brennan recommended affirmance of the six month minimum back pay award because the Board supported that remedy on appeal to the Supreme Court which the dissent inferred as an indication that the Board judged the award to estimate "with a fair degree of precision the period that these employees would have continued working" if petitioners hadn't reported them.[72] Justice Brennan saw no reason to restrict the other remedial modifications of the Court of Appeals for the Seventh Circuit because the NLRB had accepted them,[73] but Brennan did concur with conditioning the offers of reinstatement upon legal re-entry to the United States in order to avoid conflict with federal immigration policies.[74]

Current Chief Justice Rehnquist joined with Justice Powell in the third opinion in *Sure-Tan.*[75] In partial dissent, Justice Powell was of the opinion that illegal aliens should not be included within the definition of "employees" under the NLRA because of the aliens' status as violators of our criminal laws.[76] Justice Powell would have granted no remedy to

[67] Id. at 906 [hereinafter Justice Brennan's opinion].

[68] *Id.*

[69] *Id.* at 907, 909.

[70] *Id.* at 907.

[71] *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346-47, 22 Lab. Cas. (CCH) ¶ 67,329 (1953).

[72] Sure-Tan, Inc., v. NLRB, 467 U.S. 883, 909, 101 Lab. Cas. (CCH) ¶ 11,042 (1984).

[73] *Id.* at 913.

[74] *Id.* at 912.

[75] *Id.* at 913 [hereinafter Justice Powell's opinion]. Justice Powell has since retired from the Court.

[76] *Id.*

the discriminatees, but because the Court held that the undocumented aliens *were* entitled to NLRA protection Justice Powell joined in Justice O'Connor's opinion, concluding that this remedy provided less incentive for aliens to illegally enter and re-enter than the remedies recommended in Justice Brennan's opinion.[77]

Now that Justices Burger and Powell are retired from the Court, neither of whom favored extensive remedies for undocumented aliens subjected to unfair labor practices, one might conclude that the remedial climate for undocumented workers would improve. Current Supreme Court Justice Kennedy wrote a concurring opinion in *NLRB v. Appollo Tire Co., Inc.*[78] which supported NLRA protection, including reinstatement, for employees who were undocumented. He wrote: "If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices such as occurred in this case."[79] Of course, *NLRB v. Apollo Tire* was decided in 1979 prior to the Supreme Court's 1984 decision in *Sure-Tan*, and prior to the 1986 enactment of IRCA. Yet the case continues to be of interest both because it may be portentious of Justice Kennedy's future position on this issue and because it involved a California statute which provided in relevant part that "[n]o employer shall knowingly employ an alien who is not entitled to lawful residence in the United States..." (emphasis added).[80] The respondent employer, Apollo Tire Co., argued unsuccessfully that a reinstatement order would violate state law even if it were not inconsistent with federal immigration laws.[81] The Ninth Circuit upheld the NLRB's decision to exclude evidence that the charging parties were undocumented aliens who were not entitled to work and reside in the United States.[82]

Another Ninth Circuit case, *Bevles Co., v. Teamsters Local 986*,[83] which was decided five months prior to the enactment of IRCA, upheld an arbitration award granting reinstatement and back pay to undocumented employees who were terminated in 1983 by their employer under color of the same California statute.[84] The Court of Appeals for the Ninth Cir-

[77] *Id.*

[78] 604 F.2d 1180, 1184, 86 Lab. Cas. (CCH) ¶ 11,523 (9th Cir. 1979).

[79] *Id.* The case involved NLRA Section 8(a)(1) and 8 (a)(4) violations. *Id.*

[80] Cal. Labor Code § 2805(a) (West Supp. 1988); NLRB v. Apollo Tire Co. 604 F.2d 1180, 1183-84 (9th Cir. 1979).

[81] 604 F.2d 1180, 1183, 86 Lab. Cas. (CCH) ¶ 11,523 (9th Cir. 1979).

[82] *Id.* at 1181.

[83] 791 F.2d 1391, 105 Lab. Cas. (CCH) ¶ 12,006 (9th Cir. 1986), *cert. denied*, 108 S.Ct. 500 (1987).

[84] *Id.* at 1392.

cuit found that regulations implementing § 2805 of the California Labor Code had been repealed in 1982 due to the confused state of the law surrounding § 2805.[85] The standard of judicial review . . . "of an arbitrator's interpretation of a collective bargaining agreement is much more limited than its review of a decision of the NLRB in a labor dispute" (citations omitted).[86] Thus, the appellate court affirmed the district court's confirmance of the award which was not in "manifest disregard of the law."[87] The two grievants in *Bevles* had not been subjected to INS proceedings and remained in the country. The Ninth Circuit distinguished the facts from *Sure-Tan* where the discharged employees had left the country. In *Sure-Tan*, an unconditional reinstatement offer would have encouraged illegal re-entry and created potential conflict with the INA.[88]

Although *Bevles* was decided prior to IRCA's enactment, the Supreme Court denied *certiorari* in December, 1987,[89] leaving the Ninth Circuit's affirmance undisturbed despite the enactment of IRCA in November, 1986. This outcome can be reconciled with IRCA in that the discriminatees had been hired *prior to* November, 1986, the date after which hiring of unauthorized aliens became unlawful pursuant to federal law. In addition, the grievants in *Bevles* might have qualified for the legalization program under Section 245A of IRCA. IRCA also created a new public policy issue which favored the Supreme Court's denial of *certiorari* in *Bevles*. Public policy against employer discrimination on the basis of national origin was extended to reach smaller employers under IRCA[90] than had previously obtained under Title VII.[91] IRCA antidiscrimination provisions also authorized complaints alleging employer discrimination based upon an individual's status as a non-citizen,[92] whereas under Title VII, it was not illegal to discriminate on the basis of citizenship or alienage.[93]

CONCLUSION

The NLRB can lawfully order reinstatement for victims of unfair labor

[85] Bevles Co., v. Teamsters Local 986, 791 F.2d 1391, 1395, 105 Lab. Cas. (CCH) ¶ 12,006 (9th Cir. 1986).

[86] *Id.* at 1393.

[87] *Id.*

[88] *Id., citing* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903, 101 Lab. Cas. (CCH) ¶ 11,042 (1984).

[89] 108 S. Ct. 500 (1987).

[90] 8 U.S.C.A. § 1324b.

[91] 42 U.S.C.A. § 2000e-2 (1982).

[92] 8 U.S.C.A. §§ 1324b(a)(1)(A), (B) (West Supp. 1988).

[93] Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95, 6 E.P.D. (CCH) ¶ 8944 (1973). Note that unlike Title VII, under IRCA, where applicant qualifications are the same, an employer can prefer citizens over noncitizens. 8 U.S.C.A. § 1324b(a)(4) (West Supp. 1988).

practices as long as the discriminatees remain in the country or are required to legally re-enter the United States prior to reinstatement. The Board is correct to require from the employer an INS determination that a discriminatee is not lawfully entitled to be present and employed in the U.S. before precluding the normal remedies of reinstatement and back pay for those hired on or before November 6, 1986.[94] This method succeeds in avoiding the concerns expressed by the Ninth Circuit in *Local 512*, that ". . . the Board exceeds both its authority and its expertise in requiring its compliance officers to determine the immigration status of an individual discriminatee."[95]

In light of IRCA, it makes sense to distinguish discriminatees who were hired after Nov. 6, 1986. If such employees are unwilling or unable to complete the Form I-9 prior to reinstatement, the General Counsel would neither seek reinstatement nor back pay for subsequent periods in light of the public policy expressed in IRCA.[96] In *Sure-Tan*, the Supreme Court did not totally reject the notion of back pay for undocumented workers, rather the Court approved the Board's original order of reinstatement with back pay to be determined at the compliance proceedings.[97] However, the Court stated that the ". . . the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States."[98] Thus, entitlement to back pay even for those hired on or before Nov. 6, 1986, is limited to those who legally re-enter, and discriminatees ". . . must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when not lawfully entitled to be present and employed in the United States."[99] The Board will permit an employer to present evidence that bears on the issue of the discriminatees' legal presence in the country at the compliance stage.[100]

[94] R. Collyer, *supra* note 39 at 2, *citing Local 512*, 795 F.2d 705, 720-22, 105 Lab. Cas. (CCH) ¶ 12,005 (9th Cir. 1986).

[95] 795 F.2d 705, 722 (9th Cir. 1986).

[96] R. Collyer, *supra* note 39 at 6.

[97] 467 U.S. 883, 901-903 (1984).

[98] *Id.* at 902-03.

[99] *Id.* at 903.

[100] R. Collyer, *supra* note 39 at 2; *Caamano Bros., Inc.*, 275 N.L.R.B. 205 n.1, 119 L.R.R.M. 1062 (1985).