Attempting to Find Some Common Ground for Illegal Aliens, and The Board's Ability to Award Back Pay: Hoffman Plastic Compounds, Inc. v. NLRB

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Attempting to Find Some Common Ground for Illegal Aliens, and The Board’s Ability to Award Back Pay: 
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Dating back to 1943, the National Labor Relations Board has granted rights guaranteed to employees under the National Labor Relations Act to illegal aliens. In Hoffman Plastic Compounds, Inc. v. NLRB (“Hoffman”), the United States Supreme Court attempted to put some closure on the issue of whether illegal alien employees were entitled to reinstatement into their previous employment positions and whether they were entitled to back pay for the time they had been unemployed.1 The United States Supreme Court seemed to settle the issue of back pay by holding that illegal aliens were not entitled to pay that could have been earned because they were violating a federal law banning illegal entry into the United States.2 Although the issue of back pay was settled, how this will affect actions taken by federal agencies remains to be seen. The author investigates both the Supreme Court’s analysis of the decision and its future impact.

* The author is a J.D. Candidate, 2004, at Pepperdine University School of Law. This is evidence that “I can do all things through Christ who strengthens me.” I am forever grateful and thankful to my Mom, Pops, Artie, Michael, Jessica, and Jena for their undaunted love and support throughout. I love you all. This casenote is also dedicated to all those who have come to the United States (including my ancestors) in search of better lives.

2. Id.
I. INTRODUCTION

Imagine that a company in a major U.S. city is met with the threat of a union representing its employees. In learning that some of its employees are joining the union and promoting its cause, the company questions them and asks them to cut all ties to the union. When the employees refuse, they are fired from the company.

This situation was relatively common prior to the establishment of the National Labor Relations Act ("NLRA" or "Act"). While the Act seeks to prevent such practices and even dictates sanctions for such behavior, they continue to occur regardless of the threat of National Labor Relations Board ("NLRB" or "Board") penalties.

Suppose that the same small company knowingly hires several employees who are illegal immigrants from Mexico. The company hires them for various reasons and pays them low wages knowing that they will either soon be discovered to be in the U.S. illegally by the proper authorities, or that the illegal aliens will be too afraid to report any unfair practices that their employer places upon them.

This second scenario was also frequently played out prior to the establishment of the Immigration Reform and Control Act of 1986 ("IRCA"). The IRCA sought to make it illegal for employers "knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility." It is under similar circumstances from which Hoffman arose in that an employee who had been wrongfully discharged because of his association with a labor union after he was reinstated and subject to back pay revealed that he had been in the United States illegally.

An early NLRB case paved the way for the application of the protection of the NLRA to illegal aliens. The Board stated in dicta that national policy prohibited a limitation of NLRB protection to an

6. U.S. Bedding Co., 52 N.L.R.B. 382 (1943) (holding that a company opposed to a scheduled representation election because the majority of the members of the petitioning union were black was improper).
employee based on that employee’s “race, creed, color, or national origin.” 7 This was finally affirmed by the Supreme Court in Sure-Tan Inc. v. NLRB (“Sure-Tan”), yet the Court refused to extend the application of the Act to back pay. 8 Finally, in Hoffman the Supreme Court decided that “allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.” 9 This ruling brings to light the issue of whether or not the United States immigration laws overstep their boundaries and if they do so at the cost of promoting unfair and unjust practices, such as free labor. The Supreme Court had a difficult time wrestling with the issue, which was made evident by the fact that the case was decided on a five-to-four basis. Chief Justice Rehnquist, who delivered the opinion of the court, was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. 10 Justice Breyer dissented in an opinion in which Justices Stevens, Souter, and Ginsburg joined. 11

This casenote will provide a brief overview of the development of the NLRB and the role that Administrative Law Judges (“ALJs”) play in the implementing of the Board’s policies and the parameters of the Board’s control. This casenote will also seek to investigate the development and impact of the NLRA and the IRCA on labor relations involving illegal immigrants’ rights to back pay. Additionally, this casenote will analyze both the majority and dissenting opinions of Hoffman, discussing their strengths and weaknesses. Finally, it will conclude with an analysis of the repercussions of the Court’s decision on the current and future status of the illegal alien worker.

7. Id. at 388.
10. Id. at 137.
11. Id. at 153.
II. HISTORICAL BACKGROUND

A. The Impact of Policies on Illegal Aliens

The NLRA came into effect on July 5, 1935, to promote policies such as: the practice of collective bargaining, the free flow of interstate commerce, and the freedom of workers to organize. This congressional act formed the NLRB which was intended to be both the governing and implementing body of the Act.

For a business to come under the governing powers of the NLRB, the Board must have jurisdiction over that business. The requirement of section 141 is that the business "effect commerce." The employee must additionally come under the protection of the Act. Employee, as used in section 151, is broadly defined in section 152(3). The issue of who is an employee under the Act falls within "the usual administrative routine of the Board."

13. 29 U.S.C. §141 (1982). See also NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 29-32 (1936) (holding that the policy of the Act is to "eliminate these causes of obstruction of the free flow of commerce").
14. For a complete outline of the structure and power of the National Labor Relations Board, see T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW (1984).
15. Jones & Laughlin Steel Corp., 301 U.S. at 30-32 (stating that the Board’s authority does not reach all industrial employer and employee relationships, but only those relationships that affect commerce).
16. 29 U.S.C. § 141(b) (1982). The Act then defines the meaning of affecting commerce in section 152(7). "The term ‘affecting commerce’ means in commerce, or burdening or obstructing commerce or the free flow of commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.” 29 U.S.C. § 152(7) (1982). See also Jones & Laughlin Steel Corp., 301 U.S. at 31-32.
17. 29 U.S.C. §152(3) (1982) (stating that: “The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .”). Id.
The basis for including illegal aliens as employees was formed in 1943. The Board resolved that, as a matter of national policy, limitations on the protection of an employee would not be based upon "race, creed, color or national origin."20

The passage of another Act, the IRCA,21 had other repercussions, such as limited antidiscrimination provisions, penalties against employers of undocumented workers, and an amnesty program legalizing aliens who had been in the United States unlawfully prior to January 1, 1982.22 Before IRCA’s enactment, it was legal to hire unauthorized workers. The IRCA made it unlawful to knowingly hire illegal aliens and created penalties for those who knowingly violated the Act.23 Under the IRCA, employers must check certain documents which prove citizenship or immigration status for all employees.24

IRCA’s goal is not to punish illegal aliens, but rather employers, by implementing sanctions upon employers for knowingly employing illegal aliens.25 The IRCA allows for a “graduated scale” of penalties for violations of the statute that includes the issuance of cease and desist orders and fines.26 However, “the employer sanctions scheme

20. Id. at 388.
24. Id.
25. Maria L. Ontiveros, To Help Those Most in Need: Undocumented Workers’ Rights and Remedies Under Title VII, 20 N.Y.U. REV. L. & SOC. CHANGE 607, 616 (1993-1994). The Act does not punish undocumented workers who seek or take employment. Id. at 612. However, this fact does not mean that undocumented workers will not be subject to penalties for being in the country illegally under immigration laws.
26. For the first offense, fines range from $250 to $2000 for each alien hired; for a second offense, fines are between $2000 and $5000 for each alien employed; and, a third offense results in penalties of $3000 to $10000 for each alien hired. 8 U.S.C. § 1324a(e)(5). The failure to complete and maintain proper paperwork carries a fine of $100 to $1000 for each individual with respect to whom the violation occurred. Id. at § 1324a(e)(5). Employers are sanctioned with criminal
has done little to rectify the 'embarrassing secret' of immigration—that illegal immigrants play an invaluable role in our daily lives."  

President George W. Bush has been critical of imposing penalties on employers for hiring "somebody [who] is willing to do . . . work . . . others in America aren't willing to do."  

Even after IRCA’s establishment, the NLRB continued to hold that limited back pay awards were proper. Even back pay awards were limited to the period between the discharge and the date the workers "are reinstated or when, after a reasonable period of time, they are unable to produce the documents enabling the [employer] to meet its obligations under IRCA to verify their eligibility for employment in the United States." Thus, Hoffman seems to have quelled the issue of illegal aliens’ right to back pay.

**B. The Board’s Decisions**

The NLRB’s view that illegal aliens are employees within section 2(3) of the Act is fairly modern, dating back only to 1973.

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penalties for repeated violations; criminal penalties are fines of up to $3000 for each unauthorized alien and/or six months imprisonment. *Id.* at § 1324a(f)(1).


31. *Hoffman*, 535 U.S. at 149. Though the circuit courts have generally held limited back pay and reinstatement remedies to be in line with immigration laws, there is an inconsistency about how to fashion such awards, if they are awarded at all. Courts grant back pay and other remedies at their discretion, based on the fact that IRCA penalizes the employers and not the undocumented aliens. However, courts and the NLRB pay little attention to the fact that the INS may eventually penalize the illegal aliens by deporting them. Whether courts and agencies follow *Hoffman* or distinguish the case on its facts remains to be seen. However, prompt action by Congress would eliminate the need to make such decisions.

32. *See, e.g.*, Lawrence Rigging, Inc., 202 N.L.R.B. 1094, 1095 (1973) (eligibility of aliens to vote in Board elections “well established”); Seidmon, Seidmon, Henkin & Seidmon, 102 N.L.R.B. 1492, 1493 (1953) (eligibility of
Despite several years of consistently holding that illegal aliens are employees within section 2(3), and thus deserved the protection of the Act, the Board has failed to provide a sound analysis for this determination. In determining that illegal aliens are employees under the Act, the Board has simply deferred to previous Board decisions which stood either for the same proposition, or for the proposition that non-citizenship is not a proper reason for being excluded from a labor organization, such as a union, or disqualification from voting in elections conducted by the Board. The Board has thus held that the NLRA granted protection to illegal aliens' use of section 7 rights without formally articulating the reasons for granting such protection. This has also been the case in representation cases. All that the Board's rulings amounted to was reiteration, not analysis.

In 1980, the Board finally recognized in Duke City Lumber, Inc. v. NLRB that its past decisions had only rationalized the Act's coverage in terms of alienage per se, instead of on the basis of the legal or illegal status of such aliens in determining exclusions from labor organizations. In Duke City Lumber a Texas employer hired 185 employees to work at his two sawmills. All employees were

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36. See supra note 32 and accompanying text.
37. See, supra note 35 and accompanying text.
38. Id.
39. See supra note 33.
41. Id.
allowed to join the labor union, with the exception of the illegal alien employees. The reason for the denial of coverage, the labor organization argued, was that there were insufficient common interests amongst the employees. The Board determined that under the NLRA no distinctions can be made between citizens and non-citizens. Thus there was no viable reason to deny employees from a labor organization based on their immigration status.

Trying to define its decision not to differentiate illegal alien employees from other employees, the Board noted that no evidence existed that showed that the employees, whether legal or illegal, lacked a community of interest with regard to wages, hours, benefits, job duties, or terms and conditions of employment. The fact that the aliens were illegally present in the United States was not relevant because of the lack of Federal legislation prohibiting the hiring of illegal aliens, and it was not the Board's duty to change the obligations imposed by the NLRA in order to follow immigration policies.

These examples of NLRB practices demonstrate that the Board has routinely granted illegal aliens coverage under the Act without giving any clear justification. Not until Duke City Lumber did the Board explain that no exclusion of illegal aliens existed within the Act. In order to assist in the interpretation of the definition of 'employee' in the NLRA, this casenote shifts to decisions of courts of appeals.

C. Previous Circuit Court Decisions

Before Sure-Tan only two circuit courts of appeals had dealt with the issue of whether illegal alien employees deserved 'employee]' status under the NLRA. The first court to do so was the United States Court of Appeals for the Seventh Circuit in NLRB v. Sure-Tan,

42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
47. Id. at 53-54.
48. Id. at 54.
Inc. and *Surak Leather Co. (Surak Leather)*,\(^{49}\) and the second was the United States Court of Appeals for the Ninth Circuit in *NLRB v. Apollo Tire Co., Inc.*\(^{50}\)

*Surak Leather* dealt with a challenge to a union authorization campaign\(^{51}\) which preceded the events that led to *Sure-Tan*, despite the cases having no procedural relation.\(^{52}\) In *Surak Leather* the controversy surfaced when, after the Union garnered the votes of six out of the seven employees eligible to vote,\(^{53}\) the employer denied the union the right to collectively bargain.\(^{54}\) The Board concluded that illegal aliens were employees under the NLRA, and thus had the ability to vote in a Board election.\(^{55}\)

Following this Board decision,\(^{56}\) the employer appealed the certification of the Union and argued that it was improper because a majority of the employees who voted were illegal aliens.\(^{57}\) The Seventh Circuit upheld the Board’s decision in that illegal aliens were employees under the Act and thus were eligible to vote in a certification election.\(^{58}\) In its analysis, the court first noted the traditional and consistent interpretation by the Board that aliens are covered as employees by the Act.\(^{59}\) Second, the court noted the broadness of the Act’s language which failed to specifically exclude aliens.\(^{60}\) Third, the court stated that the Board’s interpretation would be upheld unless there are ‘compelling indications that it is wrong.’\(^{61}\) The court finally determined that granting illegal aliens NLRA coverage was in line with federal immigration policy because there were no immigration statutes which prohibited illegal aliens either

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49. *Surak Leather*, 583 F.2d 355 (7th Cir. 1978).
50. *Apollo Tire Co., Inc.*, 604 F.2d 1180 (9th Cir. 1979).
51. *Surak Leather*, 583 F.2d at 356.
53. 583 F.2d at 357.
54. *Id.*
55. *Id.*
56 *Id.*
57. *Id.* at 358.
58. *Id.* at 359.
59. *Id.*
60. *Id.*
61. *Id.*
from employment or from voting in a Board election. The court concluded that to decline to certify the Union on the grounds that it is composed of illegal aliens, would only foster illegal immigration, because employers would have an additional incentive to hire illegal aliens and thus limit unionization.

This same question of the status of illegal aliens under the NLRA was addressed by the Ninth Circuit in *N.L.R.B. v. Apollo Tire Co.* This case involved several alien employees who were fired by their employer in response to the employees' filing of a complaint with the Secretary of Labor alleging that the employer had failed to pay its employees overtime wages. The court affirmed the Board's finding of unfair labor practices and its issuance of cease and desist orders along with reinstatement orders. The issue before the court of appeals in *Apollo Tire* was whether the Board's prohibition of evidence of the employees' undocumented immigration status was improper. The court enforced the Board's order, holding that the Board had not erred in not allowing into evidence the illegal status of the employees. The *Apollo Tire* court used similar reasoning as that of the *Surak Leather* court in determining that illegal aliens were employees within the meaning of the Act. The court sided with the *Surak Leather* decision that the Board's consistent interpretation of the Act as including aliens is appropriate and that giving illegal aliens the protection of the NLRA would best promote the policies contained in our immigration laws.

Thus, before the Supreme Court's decision in *Sure-Tan*, the courts that ruled on this issue consistently held that illegal alien workers were "employees" under the NLRA. The courts based their decisions on judicial deference to the Board's historic practice, and the lack of

62. Id.
63. Id. at 360.
64. 604 F.2d 1180 (9th Cir. 1979).
65. Id. at 1181-82.
66. Id. at 1182, 1184. The unfair labor practices were held to be violations of section 8 (a)(1) and (4) of the Act.
67. 604 F.2d at 1181.
68. Id. at 1184.
69. Id.
70. Id.
71. Id.
any clear exclusion of illegal aliens within the language of the NLRA itself, or any viable conflict with immigration legislation. In conclusion the above mentioned court of appeals’ decisions considered their holdings to be in line with the immigration laws’ policy of curtailing illegal immigration. Although the Surak Leather and Apollo Tire courts heavily relied on the doctrine of judicial deference to the NLRB, these decisions looked past the indecisive legislative and procedural history of the Act in granting illegal aliens employee status under the Act.

D. Illegal Aliens’ Rights in the Workplace

Aliens within the borders of the United States are granted substantial rights. These rights have traditionally included those afforded to United States workers under the NLRA and the Fair Labor Standards Act (“FLSA”). Both acts include unauthorized aliens within their definitions of employee.

Some legislators viewed the policy of attaching legal employee status to illegal aliens as a conflict between labor and immigration law. The NLRB, the Department of Labor, and reviewing courts, however, supported application of traditional employee protections to unauthorized aliens, noting the Immigration and Nationality Act (“INA”) was silent regarding the employment status of unauthorized

72. Id.
73. Id.
74. Id.
77. The FLSA defines employee as “any individual employed by an employer.” 29 U.S. C. § 203 (e)(1) (2003). The NLRA provides that the term “employee” shall include “any employee....” Id. § 152(3) (emphasis added).
78. 132 Cong. Rec. S 16,880 (daily ed. Oct. 17, 1986) (statement of Sen. Alan Simpson). Senator Alan Simpson commented that “the law of the United States is the most bizarre of any law in the country. It simply means it is legal to hire an illegal, but it is illegal for the illegal to work . . . . And is that not absurd?” Id.
aliens.\textsuperscript{79} The Supreme Court in *Hoffman* acknowledged such conflict, however, and again raised the question as to how federal labor laws should be applied in the future.\textsuperscript{80}

### III. FACTUAL BACKGROUND

#### A. Facts of the Case

In *Hoffman*, Hoffman Plastic Compounds, Inc. hired Jose Castro for the position of machine operator.\textsuperscript{81} Prior to his hiring, Mr. Castro presented documents that seemed to suggest that he was legally authorized to work in the United States.\textsuperscript{82} Mr. Castro, along with other employees, soon joined the United Rubber, Cork, Linoleum and Plastic Workers of America ("AFL-CIO") and helped in the organizing and distribution of authorization cards to coworkers.\textsuperscript{83} After discovering the activities of their employees, Hoffman laid off Castro and the other employees involved.\textsuperscript{84}

After charges were filed, the Board concluded that Hoffman had violated § 8(a)(3) of the NLRA.\textsuperscript{85} The Board then ordered and Hoffman agreed to "(1) cease and desist from further violations of the NLRA, (2) post a detailed notice to its employees regarding the remedial order, and (3) offer reinstatement and back pay to the four affected employees."\textsuperscript{86} The parties then proceeded to a hearing before an ALJ to finalize the amount owed to each discharged employee. Mr. Castro then testified that he had been in the United States illegally and was not authorized to work.\textsuperscript{87} Mr. Castro then testified that he had gained employment including employment

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\textsuperscript{80} *Hoffman*, 535 U.S. 144-45.
\textsuperscript{81} *Id.* at 139.
\textsuperscript{82} *Id.*
\textsuperscript{83} *Id.*
\textsuperscript{84} *Id.*
\textsuperscript{85} *Id.* Section 158(a)(3) of the NLRA forbids discrimination "in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization[.]" 29 U.S.C. § 158(a)(3) (2003).
\textsuperscript{86} *Hoffman*, 535 U.S. 140-41.
gained after being laid off from Hoffman, a driver’s license, and a social security card by using a friend’s birth certificate. Using this testimony, the ALJ determined that the Board was precluded from granting Mr. Castro back pay or reinstatement of his position because it would be contrary to prior Supreme Court precedent and the IRCA.

Four years after the ALJ’s decision, “the Board reversed with respect to back pay.” After denying Hoffman’s petition for review and rehearing en banc, the Court of Appeals enforced the Board’s order, as modified.

B. Lower Court’s Analysis and Reasoning

Judge Tatel, who wrote for the court, disagreed with the argument that Sure-Tan should control the outcome of Hoffman: “[I]n computing back pay, the employees must be deemed ‘unavailable’ for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.” Sure-Tan involved workers who had left the United States to avoid deportation, something Mr. Castro never did. Judge Tatel argued that this sentence applied only to instances in which undocumented workers reentered the country

88. Id.
89. Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984) (holding that the NLRA applied to illegal aliens as well).
90. 314 N.L.R.B., at 685-86 (makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility), 1994 WL 397901k, at **4-**6.
91. 326 N.L.R.B. 1060 , 1998 WL 663933 (citing its earlier decision in A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408, 1995 WL 803434, the Board determined that “the most effective way to accommodate and further the immigration policies embodied in IRCA is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees.” 326 N.L.R.B. at 1060.
93. Chief Judge Edwards and Judges Williams, Rogers, Garland, and Silberman joined Judge Tatel.
95. Id. at 642, 645.
illegally to claim back pay awards. The court claimed that Hoffman's interpretation conflicted with "other language" in Sure-Tan that clearly substantiated the Board's award of reinstatement and back pay to undocumented workers. Sure-Tan, according to the court, failed to address "whether undocumented workers remaining at work in the United States throughout the back pay period are entitled to back pay awards."

The court then rejected the argument that a back pay award would conflict with the IRCA's goal of restricting the hiring of illegal workers. They relied on New York Shipping Ass'n, Inc. v. Federal Maritime Comm'n, which held that with regard to NLRA enforcements, the Board must "minimize[] the impact of its actions on the policies of . . . other statute[s]," like those set forth in the IRCA. As in this case, the Board needed "to accommodate the policies of another statutory regime," it must demonstrate a "careful analysis" of the competing regimes and must explain "why the action taken minimizes . . . its intrusion into policies that are more properly the province of another agency or statutory regime."

The lower court believed that Congress' goal was not to limit the NLRA, "even indirectly." The Board's decision was thus affirmed, holding that to "fully enforce the requirements of its own statute," the Board must be granted the deterrent capability of back pay. Judge Tatel agreed with and cited to the Board's previous decision in

96. Id. at 644.
97. Id. The majority further argued that if the Court had intended to preclude all remedies for undocumented workers in Sure-Tan. Id.
98. Id. at 645.
99. Id. at 646.
101. Id. at 1367.
102. Hoffman, 237 F.3d at 647 (quoting New York Shipping, 854 F.2d at 1367) (internal quotation marks omitted).
103. Id. (quoting New York Shipping, 854 F.2d at 1370 (internal quotation marks omitted).
104. Id. at 646.
105. Id. at 647 (quoting New York Shipping, 854 F.2d at 1367) (internal quotation marks omitted).
A.P.R.A. Fuel Oil Buyers Group\textsuperscript{106} which suggested that the denial of back pay would allow employers to "simply fire undocumented workers who try to organize and then raise 'the unlawful immigration status . . . in retaliation for protected activities'; employers might even 'consider the penalties of IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance.'\textsuperscript{107} The court also agreed with the Board’s argument that limiting remedies may even injure legally eligible workers. This would occur because "the continuous threat of replacement with powerless and desperate undocumented workers would certainly chill the American and authorized alien workers' exercise of their . . . rights" under the NLRA.\textsuperscript{108}

\textbf{C. One Final Decision}

The Supreme Court granted a petition for writ of certiorari,\textsuperscript{109} on the employer’s request, to review the awarding of back pay. On March 27, 2002, in a five to four decision,\textsuperscript{110} the Court reversed both the Board’s and the court of appeals’ decision holding that the awarding of back pay to an undocumented alien who had never been legally authorized to work in the United States is foreclosed by federal immigration policy, as expressed by Congress in the IRCA.\textsuperscript{111}

\begin{thebibliography}{9}
\bibitem{106} 320 N.L.R.B. 408 (1995).
\bibitem{107} 237 F.3d at 647 (quoting A.P.R.A. Fuel, 320 N.L.R.B. at 415).
\bibitem{108} Id. (quoting A.P.R.A. Fuel, 320 N.L.R.B. at 414) (internal quotation marks omitted). Judge Tatel also addressed Hoffman’s equal protection argument that by awarding back pay to undocumented workers, “the Board treats illegal aliens more favorably than documented workers[].” \textit{Id.} at 650 (quoting Brief for Petitioner at 33) (internal quotation marks omitted). Judge Tatel rejected this argument because Hoffman lacked standing to assert an equal protection claim on behalf of documented workers and because Hoffman pointed to no supporting evidence. \textit{Id.}
\bibitem{110} Hoffman, 535 U.S. at 139.
\bibitem{111} Id.
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IV. SUMMARY OF OPINION

A. Majority

1. Board’s Authority to Design Remedies

Writing for the Court, Chief Justice Rehnquist initially examined the Board's ability to grant remedies under the NLRA. He resolved that the Board did not have authority to grant remedies that contravene other, important statutory schemes, and stated that, "[T]hough generally broad," the Board's remedy granting power "is not unlimited." The Court had "consistently set aside awards of reinstatement or back pay to employees found guilty of serious illegal conduct in connection with their employment." Another area where the Board lacks discretion is in policy arenas in which it lacks expertise: the Court noted that, since Southern Steamship Co. v. NLRB, it had "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."

The Court then examined whether the Board's award defied other federal policies. The Court investigated Sure-Tan's "express limitation of back pay to aliens 'lawfully entitled to be present and employed in the United States.'" Instead of deciding whether the "isolated sentences . . . definitively control" the case, the Court approached the issue "through a wider lens, focused . . . on a legal landscape now significantly changed." The Court determined that the IRCA "forcefully made combating the employment of illegal

113. Id. at 143-46.
114. Id. at 143.
115. Id.
117. Hoffman, 535 U.S. at 143; see also Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942).
118. Hoffman, 535 U.S. at 146 (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1984)).
120. Id.
aliens central to [t]he policy of immigration law." The requirement of potential employees presenting documents, IRCA's "employment verification system", attempted to "deny employment to aliens who (a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States." It is a crime under IRCA, the Court held, for an illegal alien to tender fraudulent documents, and employers must immediately terminate any employee discovered to be unauthorized, or who presents fraudulent documents.

2. Board's Back Pay Award Impact on the IRCA

Finally, the Court sought to determine whether the back pay remedy by the Board impermissibly violated the IRCA. Noting that "it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies," the Court concluded that "recognizing employer misconduct but discounting the misconduct of illegal alien employees . . . subverts" the IRCA. The awarding of back pay "not only trivializes the immigration laws," but "encourage[s] the successful evasion of apprehension by immigration authorities, condone[s] prior violations of the immigration laws, and encourage[s] future violations." The unemployed individual may not legally perform his duty to mitigate damages by attaining other employment. Also, "traditional remedies" such as conspicuous workplace notices and cease-and-

123. Hoffman, 535 U.S. at 147; see also 8 U.S.C. §§ 1324a(a)(1), (h)(3).
125. Id. at 148-52.
126. Id. at 148.
127. Id. at 150.
128. Id. “Castro thus qualifies for the Board’s award only by remaining inside the United States illegally.” Id.
129. Id.
desist orders are "sufficient to effectuate national labor policy."\textsuperscript{130} The Court ultimately concluded that "allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in the IRCA."\textsuperscript{131}

\textbf{B. Dissent}

1. Misanalysis of the Board’s Role

Many of the same arguments were made by the dissent to reach a very different result. Justice Breyer, writing for the dissent, argued that the NLRB back pay remedy promotes the goals of both the NLRA and the IRCA.\textsuperscript{132} The dissent reasoned that the back pay remedy is crucial in deterring violations of the NLRA.\textsuperscript{133} If the NLRB was denied the remedy of back pay, an important "weapon[] in its remedial arsenal," would be lost if it could only apply "future-oriented obligations upon law-violating employers . . . ."\textsuperscript{134} This in turn would allow, "employers [to] conclude that they can violate the labor laws at least once with impunity."\textsuperscript{135}

The dissent also argued that the back pay remedy supports federal immigration policy. The IRCA employment restrictions seek to destroy "the attractive force of employment, which like a 'magnet' pulls illegal immigrants towards the United States."\textsuperscript{136} However, according to the dissent, the possibility of back pay would not affect the decision to immigrate illegally.\textsuperscript{137} Justice Breyer, on the other hand, points out a possible problem. Preventing back pay awards would lower the cost of labor law infractions and increase "the employer's incentive to find and to hire illegal-alien employees[.]"

\textsuperscript{130} \textit{Id.} at 152 (citing \textit{Sure-Tan}, 467 U.S. at 904).
\textsuperscript{131} \textit{Id.} at 151.
\textsuperscript{132} \textit{Id.} at 153.
\textsuperscript{133} \textit{Id.} at 153-54.
\textsuperscript{134} \textit{Id.} at 153.
\textsuperscript{135} \textit{Id.} at 154.
\textsuperscript{136} \textit{Id.} at 155 (quoting H.R. REP. NO. 99-682, at 45 (1986)).
\textsuperscript{137} \textit{Id.} at 153-55.
perhaps with "a wink and a nod." The dissent also notes that the IRCA was established to destroy the remedial capabilities of the Board.

In conclusion the dissent reasoned that, apart from the above mentioned arguments, the Court had a duty of deference to the Board under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. According to the dissent, the Board acted with cognizant and "discriminating awareness of the consequences of its action on the immigration laws." Even the Attorney General, "responsibl[e] for immigration law enforcement," concurred with the Board's conclusion. Thus, the dissent would have affirmed the NLRB's "reasonable" interpretation.

V. ANALYSIS

A. The Majority

1. General Introduction

The majority in Hoffman seem to integrate two issues into the opinion in order to develop one result as to the issue of whether an illegal alien is entitled to back pay. The two major questions that seem to arise in the opinion are: what type of discretion does the Board have in making decisions that affect U.S. immigration policy; and whether giving illegal aliens the same access and rights to our

138. Id. at 156.
139. Id. at 156-57.
140. Justice Breyer also analyzed at length the Court's holding in ABF Freight System, Inc. v. NLRB, 510 U.S. 317 (1994), which upheld a back pay award to an unlawfully discharged employee who committed perjury during the Board's enforcement proceedings. The ABF Freight decision, according to Justice Breyer, supports his alternative holding. See Hoffman, 535 U.S. at 157-58 (Breyer, J. dissenting).
143. Id. at 152, 158, 161.
144. Id. at 159-61.
labor policies promotes the U.S. immigration policy surmised in the IRCA.

2. Board's Discretion in Making Decisions

This case is not the first time in which the Court has limited the Board's discretion, which is "generally broad."\(^{145}\) Although generally the Court has broad discretion, it "is not unlimited."\(^{146}\) Since the Board's creation, the Court has "consistently set aside awards of reinstatement or back pay to employees found guilty of serious illegal conduct in connection with their employment."\(^{147}\) "Two years later the Board awarded reinstatement with back pay to five employees whose strike on a ship led to a mutiny in violation of federal law." The Court followed this by setting aside the award.\(^{148}\)

Since Southern S.S. Co. the court has said that "where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield."\(^{149}\) Thus, the Court has precluded the Board from enforcing orders that have been found to conflict with the Bankruptcy Code.\(^{150}\) The Court has also "rejected claims that federal antitrust policy should defer to the NLRA"\(^{151}\) and "precluded the

\(^{147}\) Hoffman, 535 U.S. at 143 (2002). In NLRB v. Fansteel, the Board reinstated along with back pay employees who engaged in a "sit down strike" that led to a confrontation with local law enforcement officials. The Supreme Court set aside the award, saying:

We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct, to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. 306 U.S. 240, 255 (1939).

\(^{148}\) Southern S.S. Co., 316 U.S. at 47 (1942) (stating that "[i]t is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important congressional objectives.").

\(^{149}\) Hoffman, 535 U.S. at 147.
Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act." \(^{152}\)

The Court further limits the Board’s ability to enforce orders by going against the Board and the Court of Appeals analysis of the case and eventually reversing. \(^{153}\) Both parties rely primarily on *Sure-Tan*’s express limitation of back pay to aliens “lawfully entitled to be present and employed in the United States.” \(^{154}\) All agree that this suggests that Castro is not entitled to back pay. \(^{155}\) However, the Board and the Court of Appeals by awarding back pay allude to the idea that this limitation is applicable solely to “aliens who left the United States and thus cannot claim back pay without lawful reentry.” \(^{156}\) The other approach \(^{157}\) adopted by the Court, holds that *Sure-Tan* simply means that any illegal alien that is not “lawfully entitled to be present and employed in the United States” does not have a claim for back pay. \(^{158}\)

As applied to this case, the Board rationalized that granting Castro back pay would “reasonably accommodate” the IRCA, and would not run contrary to the IRCA’s goals. \(^{159}\) The Board contends that since the back pay period “was closed as of the date Hoffman learned of Castro’s illegal status, Hoffman could have employed Castro during the back pay period without violating the IRCA.” \(^{160}\) The Board further argues that although the IRCA made the wrongful use of documents illegal, “it did not make violators ineligible for back pay awards or other compensation flowing from employment secured by the misuse of such documents.” \(^{161}\)

The Court found that the main flaw in the Board’s analysis was that they sought to override Congress’ goal of making it against the law for an alien to gain employment through the presentation of false

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156. *Id.*
157. Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1118-1121 (7th Cir. 1992).
158. *Id.*
160. *Id.*
161. *Id.*
documents.\textsuperscript{162} The Court eventually concludes that granting back pay to individuals who are in the United States illegally runs contrary to the IRCA, and oversteps the bounds of administrative power that the Board is given.\textsuperscript{163}

This case brings to light the limits that the Supreme Court has put on the Board’s ability to make decisions and its administrative power along with the possible repercussions of interference with Board decisions, which will be discussed further in the note. This decision also brings to light that the Board’s future decisions may take one of two approaches. That is, they may either be more sound and stricter decisions when it comes to U.S. labor policy or they may continue to clash with congressional motives.

3. Back pay’s Role in the Promotion of U.S. Labor Policy

Despite Congress’ attempt to have the NLRA and IRCA coexist and complement one another, this goal still remains in doubt. While undocumented workers are seemingly granted the protection of employment and labor laws because they are employees,\textsuperscript{164} the circuit courts have yet to fashion one consistent remedy that does not clash with these laws.\textsuperscript{165} Enforcement of penalties for labor and employment violations is in constant conflict with an effective immigration policy. Many legal authorities, including the majority in

\textsuperscript{162}. \textit{Id.} (stating, “The Board asks that we overlook this fact and allow it to award back pay to an illegal alien for years of work not performed, for wages that could not lawfully have been earned, and for a job obtained in the first instance by a criminal fraud.”)

\textsuperscript{163}. \textit{Id.} (stating, “We find, however, that awarding back pay to illegal aliens runs counter to policies underlying IRCA, policies the Board has no authority to enforce or administer.”)

\textsuperscript{164}. \textit{See supra} note 23.

\textsuperscript{165}. \textit{Compare} NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc., 134 F.3d 50, 56 (2d Cir. 1997) (holding that illegal workers could collect back pay under the NLRA), and Local 512 Warehouse and Office Workers’ Union v. NLRB, 795 F.2d 705, 723 (9th Cir. 1986) (same holding), with Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir.1992) (holding that illegal workers could not collect back pay under the NLRA).
Hoffman, have yet to conclusively determine whether the granting of remedies is consistent with immigration law in light of the IRCA.  

As mentioned above the Board relied on earlier cases to come to the conclusion that Mr. Castro was entitled to back pay. In ABF Freight, the Board adopted a “rigid rule that employees who falsely testify under oath automatically forfeit NLRA remedies.” In Sure-Tan, the court limited back pay to aliens “lawfully entitled to be present and employed in the United States.” The Board interpreted this ruling as suggesting that this was limited to aliens who departed the United States, and presently cannot claim back pay without legal entry into the United States. The Court rejects these analyses and takes a broader perspective in reaching the decision that it reaches.

The Court had to examine whether or not the decision “entrenched” upon a Congressional statute that was outside of the scope of governance for the Board and if so how. In 1986, two years after Sure-Tan, Congress promoted a new policy in immigration law by enacting the IRCA, which sought to prohibit the employment of illegal aliens in the United States and made the fight against employment of illegal aliens central to “[t]he policy of immigration law.”

166. Hoffman, 525 U.S. at 149 (“[A]warding back pay to illegal aliens runs counter to policies underlying IRCA....”).
167. Id. at 143-46.
168. ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 325 (1994) (The Supreme Court held that despite employee’s false testimony under oath before an ALJ, the Board did not abuse its discretion in declining to adopt a “rigid rule” precluding reinstatement when former employee so testifies, or in ordering reinstatement with back pay upon finding that discharge was actually motivated by anti-union animus).
170. Id.
171. Id. (stating “[f]or whether isolated sentences from Sure-Tan definitively control, or count merely as persuasive dicta in support of petitioner, we think the question presented here better analyzed through a wider lens, focused as it must be on a legal landscape now significantly changed”).
172. Id.
This prohibition took the form of an “employment verification system” that was formed in order to prohibit aliens from gaining employment that “(a) are not lawfully present in the United States, or (b) are not lawfully authorized to work in the United States . . . . To enforce it, [the] IRCA mandates that employers verify the identity and eligibility of all new hires by examining specified documents before they begin work.” If the applicant fails to provide this documentation, he or she cannot be hired.

Under the IRCA “it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies.” If an employer hires an unauthorized worker, either unknowingly or if the employee becomes unauthorized after gaining employment, the employer has a duty to discharge the worker upon uncovering the employee’s status. An employer who fails to act or violates the IRCA is subject to civil fines or may be subject to criminal prosecution.

The employee or the illegal alien also faces some stiff penalties for an IRCA violation. The undocumented alien also faces criminal charges if they seek to gain employment by undermining the verification system by producing fraudulent documents. Thus, it prohibits the undocumented alien from producing or using “any forged, counterfeit, altered, or falsely made document” or “any document lawfully issued to or with respect to a person other than the possessor” to gain employment in the United States. Aliens who

175. § 1324a(a)(1).
176. For an alien to be “authorized” to work in the United States, he or she must possess “a valid social security account number card,” or “other documentation of employment in the United States which the Attorney General finds, by regulation, to be acceptable for purposes of this section”. § 1324a(b)(C)(i-ii).
178. § 1324a(a)(1).
180. § 1324a(a)(2).
181. § 1324a(e)(4)(A).
182. § 1324(a)(f)(1).
183. § 1324c.
184. § 1324c(a).
185. §§ 1324c(a)(1)-(3).
use or attempt to use such fraudulent documents are subject to fines and criminal prosecution.\textsuperscript{186}

The Court rationalized the actions by the employee as being ones that violated IRCA’s employment verification system through the production by Mr. Castro of false documents to obtain employment with Hoffman.\textsuperscript{187} The Court goes on to allude to the fact that the Board’s decision of allowing employer misconduct over the policy goals of the IRCA runs contrary to the principles for which it was established.\textsuperscript{188}

\textbf{B. The Dissent}

1. The Board’s Discretion

The dissent attacked the Court’s interference with the Board’s discretionary power. This was made evident when the Court stated “the [Court] cannot deny that the Board has especially broad discretion in choosing an appropriate remedy for addressing such violations.”\textsuperscript{189} The Court also brings to life earlier decisions that alluded to the Board’s decision making ability.\textsuperscript{190}

Back pay provided the Board with some possibility of deterrence to the employer.\textsuperscript{191} The dissent alludes to the idea that without the possibility of deterrence, the Board is left with the ability to impose only “future-oriented obligations upon law-violating employers.”\textsuperscript{192} The dissenting opinion brings forth the idea that without the ability to impose an order for back pay upon the employers, the employers in

\begin{footnotesize}
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\item \textsuperscript{186} § 1546(b).
\item \textsuperscript{187} Hoffman, 535 U.S. at 148-49.
\item \textsuperscript{188} Id. At 149-50 (stating “[f]ar from ‘accommodating’ IRCA, the Board’s position, recognizing employer misconduct but discounting the misconduct of illegal alien employees, subverts it.”).
\item \textsuperscript{189} Id. at 153.
\item \textsuperscript{190} NLRB v. Gissel Packing Co., 395 U.S. 575, 613, n. 32 (stating that the “Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.”).
\item \textsuperscript{191} Hoffman, 535 U.S. at 154.
\item \textsuperscript{192} Id.
\end{itemize}
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turn would feel inclined to violate the labor laws with some "impunity."\textsuperscript{193}

The dissent attempts to distinguish U.S. labor policy along with the Board's ability to enforce it, and the U.S. Immigration Policy, and how the immigration statute should not impede upon the Board's ability to make decisions.\textsuperscript{194} The dissent tries to divide this case into two different issues: first, that the employer, Hoffman, violated U.S. Labor Policy by discharging an employee for joining a union, and second that the illegal activity by Mr. Castro should be handled separately by separate criminal or civil penalties.\textsuperscript{195} They seem to argue that the Board's discretion should be left for implementing labor policies, which in this case they tried to do by forcing back pay on an employer who violated U.S. Labor policy by discharging an employee for joining a union.\textsuperscript{196}

Thus, the dissenting opinion seems to suggest that the majority overstepped its bounds in its denial of back pay to Mr. Castro. The discretion that has been given to the Board was intended to be broad and the decision in \textit{Hoffman} makes that less clear to the outside observer. The Court's taking of power from the Board may have repercussions in the sense that this may create a disincentive for the Board to make decisions that may seem controversial.

2. Misanalysis of the Prior Cases

The dissent suggests that the two prior cases upon which the Court relied to reach its decision, \textit{Fansteel}\textsuperscript{197} and \textit{Southern S.S. Co.},\textsuperscript{198} offer little basis for the Court's decision. The dissent seems

\textsuperscript{193} A.P.R.A. Fuel Oil Buyers Group, Inc., 320 N.L.R.B. at 415, n. 38 (stating that without potential back pay order employer might simply discharge employees who show interest in a union "secure in the knowledge" that only penalties were requirements "to cease and desist and post a notice.").


\textsuperscript{195} \textit{Hoffman}, 535 U.S. at 156-58.

\textsuperscript{196} \textit{Id.} (citing prior case where "the Court unanimously held that the Board 'retained broad discretion' to remedy the labor law violation through a back pay award, while leaving enforcement of the criminal law to ordinary perjury-related civil and criminal penalties." \textit{ABF Freight System, Inc.}, 510 U.S. at 325).

\textsuperscript{197} NLRB v. \textit{Fansteel Metallurgical Corp.}, 306 U.S. 240 (1939).

\textsuperscript{198} \textit{Southern S.S. Co.}, 316 U.S. at 47.
to focus on the underlying circumstances, which were very different from the circumstances involved in the present case. In those two cases, the Court held that the illegal conduct by the employees gave the employer “good cause” for discharge, thus cutting off any remedy that might have been justified by reinstatement or back pay. The dissent distinguishes those two cases from the present one in that Hoffman did not concern a discharge “for good cause.” The discharge in this case was an unfair labor practice by Hoffman and not an illegal act, at least at the time, by Mr. Castro.

3. The Denial of Back pay to Illegal Aliens Runs Contrary to Immigration Policy

The dissent’s main argument and underlying analysis is that the implementation of a back pay policy “will not interfere with the implementation of immigration policy” but would instead help “to deter unlawful activity that both labor laws and immigration laws seek to prevent.” The dissent argues that the awarding of back pay serves “important remedial purposes,” such as deterrence, and victim compensation. It would prevent, they argue, employers from hiring employees, whom the employers could hold something over their heads, for example: “We’ll call the INS if you cause any trouble,” without being subject to stiff penalties.

The dissent also attacks the language of U.S. Immigration laws. There are restrictions on an employer employing an alien whom they know is here illegally, and that the alien may not pass false records but “the statutes’ language itself does not explicitly state how a violation is to effect the enforcement of other laws, such as the

199. In both cases, the employees had responded with unlawful acts of their own, a sit-in and a mutiny, respectively. Fansteel, 306 U.S. at 252; Southern S.S. Co., 316 U.S. at 32-36.
201. Id.
202. Id. at 158-59.
203. Id. at 153.
204. Id. at 154.
205. Id.
206. Id.
labor laws.” Once again the dissent tries to distinguish between the violation of labor laws; Hoffman’s firing of Castro because of association with Union, versus the violation of immigration laws, Castro’s fraudulent representation of documents. The dissent tries to emphasize the Board’s role as labor law enforcer versus immigration law enforcer.

The dissent also suggests that the awarding of back pay to an illegal immigrant does not detract from the Immigration Policy of maintaining jobs in the U.S. market. Justice Breyer, in his opinion, makes this evident when he states, “[t]o permit the Board to award back pay could not significantly increase the strength of this magnetic force, for so speculative a future possibility could not realistically influence an individual’s decision to migrate illegally.” Rather, the dissent argues, it would increase this “magnetic force” by giving the employer more of an incentive to search out illegal-alien employees.

The dissent concludes by stating that the Court failed to meet its goal of making labor laws applicable to illegal aliens, “in order to ensure that ‘there will be no advantage under the NLRA in preferring illegal aliens’ and therefore there will be ‘fewer incentives for aliens themselves to enter.’”

VI. IMPACT

A. General Impact

The decision by the majority in Hoffman has two profound impacts: First, the decision gives the Board a new focus on labor decisions that involve and may infringe upon statutory law, and second, it reaffirms the importance of a sound immigration policy.

Hoffman limits, reexamines, and establishes the role that the Board

207. Id.
208. Id. (stating “the general purpose of the immigration statute’s employment prohibition is to diminish the attractive force of employment, which like a ‘magnet’ pulls illegal immigrants towards the United States.”).
209. Id.
210. Id. at 156.
211. Id. (quoting Sure-Tan, 467 U.S. at 893-94).
212. Id. at 151-52.
has in making decisions. The impact that this will have on future Board decisions is yet to be known. One possibility is that the Board can become so strict in its interpretation of the laws that it could become a one-sided administrative board. Another possibility is that people will find ways to side-step the administrative power of the Board. Time will be the true measure of this decision on the Board.

The impact that this decision will have on the workforce, both employer and employee, is still at issue. The majority resolved the immediate problem with the best possible solution while effectuating the policies and purposes of both the NLRA and the INA. The dissent raised several concerns over the implementation of the majority’s decision, calling for a stronger stance to prevent future unfair labor practices by employers. There are concerns that employers may try to side-step labor polices by hiring illegal aliens, underpaying them, threatening them, or discharging them unfairly for exercising a right that is given to every other employee in the United States.

The majority seems satisfied in its decision, suggesting that this is the best way to combat the illegal activity by both the employer and the employee. Allowing back pay to illegal aliens would, according to the majority, “encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations.”

Before Hoffman, courts were not given a clear set of rules and policies concerning undocumented workers in the United States. They faced the problem of interpreting several federal statutes enforced by different federal agencies. The back pay issue may
have been resolved, but this decisions’ affect on actions taken by federal agencies has yet to have been determined. An integrated policy that effectively and efficiently meets the goals of both immigration and labor laws is the only solution.

B. Impact on Board’s Discretion

Although many view Hoffman as a "status" and rights of undocumented workers case, the decision could also be seen as a close examination of the National Labor Review Board's power. Though the Court refused to enter the "bog of logomachy" that is brought on when one attempts to distinguish remedial from punitive damages, this limitation on the Board’s decision making ability may have precluded what, to some, may have been the most logical and positive solution of the Hoffman matter: the award of back pay to a third party, such as a mediator. Though the Court realizes the lack of punitive authority amongst the Board, it has seldom decided cases by characterizing an award as impermissibly punitive. With greater remedial flexibility, third party awards would be the Board’s most sensible choice. This type of remedy would neither grant a windfall on an undocumented worker nor benefit the illegal actions of the employer.

Hoffman exemplifies the increasing trend of the placement of limits on the board’s power and role in dictating remedies. The Board’s attempt to "effectuate the policies of [the Act]" ran afoul

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217. The uncertainty is made evident when courts grant back pay and other remedies at their discretion, based on the fact that IRCA penalizes the employers and not the undocumented aliens. However, courts and the NLRB pay little attention to the fact that the INS may eventually penalize the illegal aliens by deporting them. Whether courts and agencies follow Hoffman or distinguish the case on its facts remains to be seen. However, prompt action by Congress would eliminate the need to make such decisions.


219. Id.

220. Id. at 152 n.6 (recognizing the punitive-remedial distinction but declining to decide the case on that basis).

221. This accords with the practice of many states that have sought, in civil litigation, to direct punitive damages to state agencies. For a summary of such statutes, see BMW of N. Am. v. Gore, 517 U.S. 559, 616-18 (1996) (Ginsburg, J., dissenting).
with another legislative role. \(^{222}\) The Court’s own stance on interference with agency decisions was made clear when the Court stated, "any 'perceived deficiency in the NLRA's existing remedial arsenal,' must be 'addressed by congressional action,' not the courts."\(^{223}\) Thus, this seems to question the Court’s interference with decisions by the Board, as those made in *Hoffman*. The decision, in turn, may have cleared nothing up.

### VII. CONCLUSION

The goals of deterring violations and compensating victims have long been at the forefront of both labor and employment remedies. The goal of victim compensation through reinstatement and back pay has traditionally been available to people “available for work.”\(^{224}\) *Hoffman* attempted to clarify this goal, in holding that illegal, undocumented workers were not entitled to back pay.\(^{225}\)

To accomplish the federal labor and employment agencies' goals of enforcing their respective policies, they must maintain the ability to punish employers that harm their employees, whether documented or not. In designing solutions to these problems, both the courts and agencies have been unable to adequately find a middle ground between immigration and labor law.\(^{226}\) The INS and the legislature must work together in addressing this problem.

The reason many illegal aliens come to the United States is because of our job market.\(^{227}\) Thus, a clear and viable federal policy is crucial. Since they fear being deported they are hesitant to report

\(\text{\footnotesize 222} 29 \text{ U.S.C. \S 160(c) (2000).} \)
\(\text{\footnotesize 223} \text{ Hoffman, 535 U.S. at 152 (quoting Sure-Tan, 467 U.S. at 904).} \)
\(\text{\footnotesize 224} \text{ Sure-Tan, 467 U.S. at 883.} \)
\(\text{\footnotesize 225} \text{ Hoffman, 535 U.S. at 137.} \)
\(\text{\footnotesize 226} \text{ Some federal agencies and courts do not distinguish between workers based on documentation status and award the same remedies to both documented and undocumented workers, thereby ignoring immigration policy. Others make a distinction and limit remedies, thereby ignoring the polices behind labor and employment statutes.} \)
\(\text{\footnotesize 227} \text{ Dunne, supra note 7, at 631.} \)
unfair labor practices, which in turn creates a willingness to employ undocumented workers because of their susceptibility.\textsuperscript{228}

Congress must take adequate steps to reconcile immigration policy with labor policy that reflects and bestows full rights and remedies to all workers, while simultaneously alleviating the problem of illegal immigration. As we have seen, such a balance may be hard to accomplish. Without balanced policies, employers will continue to employ undocumented workers because the savings garnered by employing them outweighs the penalties imposed by immigration laws, and illegal immigrants will continue to violate these immigration laws because of their illusive search for a better future.\textsuperscript{229}

Only a viable labor, employment, and immigration law solution can effectively reconcile the purposes of federal labor and employment law with immigration law. It is time for Congress to build a bridge for opportunity and stop encouraging exploitation of the system both by illegal aliens and the employers.

\textsuperscript{228} For example, in August 1995, government officials raided a garment sweatshop in El Monte, California, where Thai immigrants were held in conditions similar to slavery and forced to sew for only $1.60 per hour. George White, \textit{Workers Held in Near-Slavery, Officials Say}, L.A. TIMES, Aug. 3, 1995, at A1.

\textsuperscript{229} Dunne, \textit{supra} note 7, at 626.