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Striking a Balance Among Illegal Aliens, the INA, and the NLRA: *Sure-Tan v. NLRB*

Since 1943, the National Labor Relations Board has extended rights guaranteed to employees under the National Labor Relations Act to illegal aliens. In Sure-Tan v. NLRB, the United States Supreme Court for the first time reviewed this practice, approving it and noting that reporting illegal alien employees to the Immigration and Naturalization Service (INS) might constitute an unfair labor practice. Awarding a remedy of back pay was, however, improper as speculative. The author examines the Supreme Court's analysis of the decision and explores its future impact.

I. INTRODUCTION

A small company in a major United States city is confronted with the threat of a union becoming the bargaining representative of its employees. The owners of the company are determined to disrupt the union's organizing campaign. The owners threaten the employees with less work if they support the union and promise them more work if they do not. The owners also threaten employees with discharge and plant closure if the union wins the upcoming election, but promise wage increases if the union loses the election. The employees are subsequently interrogated about their union sympathies and activities.

The scenario was a familiar occurrence prior to the enactment of the National Labor Relations Act (NLRA or Act).¹ Yet these employer practices still occur, regardless of the threat of National Labor Relations Board (NLRB or Board) sanctions.²

Many employers knowingly hire illegal aliens as employees.³ When talk of union representation arises at the company, the employers use the vulnerable status of illegal alien employees to thwart union organization. Employers may go even further and threaten to have

1. The original Act, 29 U.S.C. §§ 151-166 (1982) (enacted in 1935), has been amended by the Taft-Hartley Act, 29 U.S.C. §§ 141-197 (1982) (enacted in 1947). See *infra* notes 39-43 and accompanying text.

2. 29 U.S.C. §§ 157-158 (1982) (setting out the right of employees to organize and bargain collectively and defining unfair labor practices of employer interference).

3. Ortega, *Plight of the Mexican Wetback*, 58 A.B.A. J. 251, 252 (1972). See also Corwin, *The Numbers Game: Estimates of Illegal Aliens in the United States, 1970-1981*, 45 LAW & CONTEMP. PROBS. 223, 250-59 (1981) (profiles of illegal aliens and their impact upon the American workplace).

the illegal aliens deported if they vote for the union.⁴ It is precisely under these circumstances that *Sure-Tan, Inc. v. NLRB*⁵ arose.

In *Sure-Tan*, the owners of Sure-Tan and Surak Leather Company (employer), after attempting to disrupt an NLRB collective bargaining election in their Chicago plant, caused five Mexican employees to be deported.⁶ Subsequently, an order from the Board was issued against the employer⁷ (affirmed with slight modification by the court of appeals)⁸ which called the action of the employer a violation of sections 8(a)(1) and 8(a)(3) of the NLRA.⁹

A 1943 National Labor Relations Board case¹⁰ stated in dicta that national policy made it unlawful to limit the extension of the NLRB to an employee based on that employee's "race, creed, color or national origin."¹¹ Since then, the Board has consistently applied the rights guaranteed under the Act to illegal aliens.¹² The court of appeals has approved this Board decision on three previous occasions,¹³ but prior to *Sure-Tan v. NLRB*, the Supreme Court had never reviewed it.

The Supreme Court held in *Sure-Tan* that the Act should be extended to illegal aliens and that the reporting of such illegal alien

4. See Ortega, *supra* note 3, at 252.

5. 104 S. Ct. 2803 (1984).

6. *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1189 (1978).

7. *Id.* at 1187-88.

8. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982).

9. *Id.* at 597-602. 29 U.S.C. § 158(a)(1) (1982) (section 8(a)(1) of the NLRA) states it is an unfair labor practice for an employer: "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(3) (1982) (section 8(a)(3) of the NLRA) further defined an employer unfair labor practice: "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

10. *In re U.S. Bedding Co.*, 52 N.L.R.B. 382 (1943) (company opposition to a scheduled representation election because the majority of the members of the petitioning union were black held to be improper).

11. *Id.* at 388.

12. See, e.g., *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214, 214 (1976). Here, the employer discharged twelve illegal alien employees because of their union activities. He then claimed that state law made it unlawful to employ undocumented workers. The NLRB ordered reinstatement with back pay, stating that the constitutionality of the state law had been challenged.

13. The first federal court of appeals review of the Board's policy was in the first *Sure-Tan* case. *Sure-Tan, Inc.*, 231 N.L.R.B. 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978). The court affirmed the Board's holding that illegal aliens are employees within the meaning of the Act and are entitled to vote in a union election. The second review was *Apollo Tire Co.*, 236 N.L.R.B. 1627 (1978), *enforced*, 604 F.2d 1180 (9th Cir. 1979). The court, citing *Sure-Tan*, affirmed the Board's policy of extension of NLRA protection to illegal aliens and confirmed the right of aliens to seek the Board's assistance to secure rights guaranteed under the Act. The third review was *Sure-Tan, Inc.*, 234 N.L.R.B. 1187 (1978), *enforced*, 672 F.2d 592 (7th Cir. 1982). The court of appeals reaffirmed its holding that illegal aliens are "employees" within the meaning of the Act, which was established in the first *Sure-Tan* case.

employees to the Immigration and Naturalization Service (INS) might constitute an unfair labor practice.¹⁴ However, the Court refused to extend the minimum six month back pay award as a remedy, calling it speculative and out of line.¹⁵

The Court split seven to two on the issues of extending the NLRA to protect illegal aliens and on the finding that the employer committed constructive discharge. Justice O'Connor delivered the opinion of the Court. Justice Brennan delivered an opinion concurring in part and dissenting in part, in which Justices Marshall, Blackmun and Stevens joined.¹⁶ Justice Powell delivered an opinion concurring in part and dissenting in part, in which Justice Rehnquist joined.¹⁷

The final issue, the question of the proper remedy to apply, was closely divided five to four. Justice O'Connor was joined by Chief Justice Burger and Justices White, Powell and Rehnquist.¹⁸ Justice Brennan dissented on this issue, in an opinion in which Justices Marshall, Blackmun and Stevens joined.¹⁹ In his opinion, Justice Brennan stated that the majority created an anomaly, extending the NLRA rights to illegal aliens, yet giving the illegal aliens no remedy with which to guarantee these rights.²⁰

This casenote will give a brief overview of the development of the NLRA, exploring how the Board and the courts have interpreted the meaning of the Act. Additionally, the casenote will analyze both the majority and dissenting opinions of *Sure-Tan*, discussing their strengths and weaknesses. Finally, it concludes with an analysis of the effect of the Court's decision on the status of the illegal alien worker, now and in the future.

II. FACTUAL BACKGROUND

In *Sure-Tan*, a Board election was held at the employer's company, resulting in a victory for the union as the collective bargaining repre-

14. 104 S. Ct. at 2808-12.

15. *Id.* at 2814. The Court stated "The [appellate] court's imposition of this minimum backpay award in the total absence of record evidence as to the circumstances of the individual employees constitutes pure speculation and does not comport with the general reparative policies of the NLRA." *Id.*

16. *Id.* at 2803.

17. See *infra* note 115 and accompanying text for a discussion of Justice Powell's opinion.

18. 104 S. Ct. at 2812 (Part IV of the majority opinion dealing with the remedial question).

19. See *infra* notes 116-39 and accompanying text for a discussion of Justice Brennan's opinion.

20. 104 S. Ct. at 2819 (Brennan, J., concurring in part and dissenting in part).

sentative of the company's seven employees.²¹ The employees consisted primarily of illegal aliens. Based on the illegal status of his employees, the employer filed objections to the election with the Board, claiming that the illegal aliens were ineligible to vote, therefore invalidating the election.²² The Board overruled the objections, and held that the illegal aliens were eligible to vote.²³ Subsequently, the employer requested that the INS check into the status of some of its Mexican employees.²⁴ As a result, five employees were found to be in the country illegally and left voluntarily to avoid formal deportation.²⁵

Charges were filed, and the Board found that the employer had violated section 8(a)(3) of the NLRA when he reported the employees to the INS in retaliation for their union activities.²⁶ The Board held that the employer's action was a "constructive discharge."²⁷ A cease and desist order was issued, along with the conventional remedy of reinstatement with back pay.²⁸

On appeal, the court of appeals enforced the Board's order, as modified, to require that the reinstatement be held open for four years, so as to allow the employees time to reenter the country legally, and suggested that the Board consider a minimum six month back pay award. The Board accepted the suggestion, and a final judgment order was approved by the court.²⁹

The Supreme Court granted a petition for writ of certiorari,³⁰ on the employer's request, to review the finding of a constructive discharge and the remedy imposed by the court of appeals.³¹ On June

21. *Sure-Tan, Inc. and Surak Leather Co.*, 231 N.L.R.B. 138, 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978).

22. *Id.*

23. *Id.* at 140-41.

24. *Sure-Tan, Inc. and Surak Leather Co.*, 234 N.L.R.B. 1187, 1187-89 (1978), order denying motion for clarification, 246 N.L.R.B. 788 (1979), *enforced*, 672 F.2d 592 (7th Cir. 1982).

25. 234 N.L.R.B. at 1187. See Gordon, *The Rights of Aliens: An Expanding Role for Trial Lawyers*, 19 TRIAL 54, 58 (Dec. 1983) (the Attorney General is authorized to allow illegal aliens to depart voluntarily, at their own expense, to avoid formal deportation and the future problems attached to such forcible deportation).

26. 234 N.L.R.B. at 1187.

27. *Id.* at 1191. Note 5 of the Board's decision stated:

In view of Respondent's [employer's] knowledge that none of its employees had "papers" or work permits, its request to Immigration Service to investigate named employees would inevitably result in their deportation. Inasmuch as the request was motivated by the employees' selection and support of the Union, and Respondent is responsible for the foreseeable result of its action, their deportation is held to be a constructive discharge violative of Sec. 8(a)(3) and (1) of the Act.

Id. at 1187 n.5.

28. *Id.* at 1187-88.

29. *NLRB v. Sure-Tan*, 672 F.2d at 602-06.

30. 103 S. Ct. 1270 (1983).

31. *NLRB v. Sure-Tan*, 672 F.2d at 606.

25, 1984, in a seven to two decision,³² the Court affirmed the Board's interpretation that the Act protected illegal aliens,³³ and agreed with the Board that the employer caused a constructive discharge.³⁴ However, the Court reversed the order requiring a minimum back pay award and certain specific reinstatement orders.³⁵

III. HISTORICAL BACKGROUND

The NLRA was enacted on July 5, 1935,³⁶ to promote the following policies: the practice of collective bargaining, the freedom of workers to organize, and the free flow of interstate commerce.³⁷ This original congressional act created the NLRB as the supervisory body solely responsible for the administration and enforcement of the Act.³⁸

Following an outcry by employers of the Act's unfairness to management, Congress enacted the Labor Management Relations Act (LMRA) in 1947.³⁹ Basically, the LMRA amended the NLRA, creating more rights for the employees⁴⁰ and the employers.⁴¹ The LMRA also restructured the Board, increasing the number of Board members from three to five and creating the office of General Coun-

32. See *supra* notes 17-20 and accompanying text.

33. 104 S. Ct. 2803, 2808-09 (1984).

34. *Id.* at 2810-11.

35. *Id.* at 2813-16 (the Court split five to four on this issue). See *supra* notes 18-19 and accompanying text.

36. 29 U.S.C. §§ 151-168 (1935), reprinted in 2 NLRB, Legislative History of the National Labor Relations Act, 1935, at 3270-79 (1940).

37. See 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").

38. For a thorough outline of the structure and power of the National Labor Relations Board, see T. KHEEL, BUSINESS ORGANIZATIONS, LABOR LAW (1984).

39. 29 U.S.C. §§ 141-197 (1982) (also referred to as the Taft-Hartley Act).

40. Employee rights include:

the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157 (1982) (emphasis added). Section 158 was amended to include subsection (b)(1) for the benefit of employees, making it an unfair labor practice for a labor organization "to restrain or coerce employees in the exercise of the rights guaranteed in section 157" 29 U.S.C. § 158(b)(1) (1982).

41. Section 158 was amended to include subsection (c) for the benefit of the employers: "The expressing of any views, argument, or opinion, or the dissemination thereof, . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c) (1982).

sel.⁴² The Board's function is similar to that of a court, ruling only on those cases the General Counsel brings before it.⁴³

In order for a business to be subject to the supervisory powers of the NLRB, the Board must have jurisdiction over that business.⁴⁴ Section 141 of the Act requires that the business "effect commerce."⁴⁵ Furthermore, the employee must also come under the protection of the Act. The term employee, as used in section 151, is broadly defined in section 152(3).⁴⁶ As the Court in *NLRB v. Hearst Publications, Inc.* stated: "The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question . . . 'belongs to the usual administrative routine' of the Board."⁴⁷ Whether a particular employee is covered by the Act is left to the discretion of the Board.

The broad definition of the term employee, and the recognition by the courts that the Board determines who is covered by the Act, left an open door for the inclusion of illegal aliens within the protection of the Act.⁴⁸ The foundation for including illegal aliens was laid in the 1943 case of *In re U.S. Bedding Co.*⁴⁹ The Board concluded that, as a matter of national policy, limitations on the protection of an employee would not be based on "race, creed, color or national origin."⁵⁰ Since then, "[t]he Board consistently has held that illegal aliens are employees within the meaning of the Act."⁵¹

42. For an overview of the structure of the NLRB, see K. MCGUINNESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD 25-32 (4th ed. 1976).

43. See *supra* note 42. The Board cannot raise an unfair labor charge on its own motion.

44. 301 U.S. 1, 30-32 (1937) (stating that the Board's authority does not reach all industrial employer and employee relationships, but only those relationships that affect commerce).

45. See 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*, 301 U.S. at 31-32.

46. 29 U.S.C. § 152(3) (1982):

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.

47. 322 U.S. 111, 130 (1944) (quoting *Gray v. Powell*, 314 U.S. 402, 411 (1941)).

48. See *supra* note 46. See also *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). "[T]he Board's construction of that term is entitled to considerable deference, and we will uphold an interpretation that is reasonably defensible." *Id.* at 130.

49. 52 N.L.R.B. 382 (1943). See *supra* note 10.

50. 52 N.L.R.B. at 388.

51. *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214, 214 (1976) (where the Board held that aliens without working papers are entitled to vote and receive protection of employee rights under the Act). See also *In re Dan Logan & J.R. Paxton*, 55 N.L.R.B.

The Board supported its decision that the Act protects illegal aliens by relying on the language of section 152(3), which makes no mention of nationality or immigration status as a factor to consider when bringing an employee under the Act.⁵² Furthermore, the fact that Congress has yet to make it unlawful to employ an illegal alien assures that the Board's policy does not run contrary to federal law.⁵³

Three times the Board's decision to include illegal aliens within the meaning of the Act has been reviewed and enforced by the federal court of appeals.⁵⁴ However, no Supreme Court decision had reviewed these Board decisions until *Sure-Tan v. NLRB*.

IV. ANALYSIS

A. *The Majority*

1. General Introduction

The majority in *Sure-Tan* felt that several questions arose from the central issue of whether the NLRA applied to illegal aliens. In an opinion written by Justice O'Connor, the majority divided the issue into three major questions: whether the NLRA should apply to unfair labor practices; whether the employer's action of reporting the illegal aliens to the INS was an unfair labor practice; and whether the Board's remedial order, as modified by the court of appeals, of six

310, 315 n.12 (1944) (relying on *U.S. Bedding*, the Board held that "the Act does not differentiate between citizens and noncitizens").

It is interesting to note that in both these cases, *Logan & Paxton* and *In re U.S. Bedding*, the central issue was not inclusion of illegal aliens as employees under the Act. Yet the Board relied on these two decisions as support for its subsequent affirmations that illegal aliens are protected. See Comment, *Illegal Aliens as "Employees" under the National Labor Relations Act*, *NLRB v. Appollo Tire Co.*, 68 GEO. L.J. 851, 857 (1979).

52. 29 U.S.C. § 152(3) (1982). The section specifically excludes any individual employed as an agricultural laborer, in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act

53. 8 U.S.C. § 1324(a) (1982). The Immigration and Naturalization Act makes it a felony to import, transport or harbor an undocumented person. However, the Act specifically states the "employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." See *De Canas v. Bica*, 424 U.S. 351, 359 (1976) (stating that the "central concern of the INA is with the terms and conditions of admission to the country and subsequent treatment of aliens lawfully in the country"). See also *Kutchins & Tweedy, No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers*, 5 INDUS. REL. L.J. 339, 346 (1983).

54. See *supra* note 13.

months back pay, was an appropriate remedy.⁵⁵

2. Extension of the NLRA to Illegal Alien Workers

The Court approached this question on two grounds, initially analyzing the policy and purpose of the Act, and then ascertaining if any conflict would exist between the NLRA and the Immigration and Naturalization Act (INA) if illegal aliens were included.

Stating that the Board has consistently held that aliens were employees within the meaning of the Act, the Court focused upon the language in section 152(3) of the Act which defines the term employee.⁵⁶

The Court recognized that the task of interpreting the meaning of "employee," as defined by section 152(3), is left to the Board.⁵⁷ It fully supported the Board's interpretation in this case based on two grounds: first, that the breadth of section 152(3) is striking, as it applies to "any employee" with only a few specific limitations, none of which include illegal aliens;⁵⁸ and second, that the extension of the Act to include illegal aliens is consistent with the Act's purpose of protecting and encouraging collective bargaining.⁵⁹ Citing *De Canas v. Bica*⁶⁰ and *NLRB v. Jones & Laughlin Steel*,⁶¹ the Court recognized that if illegal aliens were excluded from the Act, a potential subclass of workers could be created consisting of illegal aliens working under substandard terms and conditions with no recourse to complain. This subclass would erode the unity of all employees and diminish the effectiveness of the labor unions.⁶²

Further, no conflict appears to exist between the NLRA and the INA.⁶³ Referring again to *De Canas*, it is pointed out that the INA is concerned with the admission of aliens into the country and their subsequent treatment. Questions of employment of illegal aliens already in the country is at best a peripheral concern.⁶⁴

55. 104 S. Ct. at 2808, 2810, 2812.

56. *Id.* at 2808-09. See *supra* note 46 (the definition of the term employee, as in section 2(3)).

57. 104 S. Ct. at 2809. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944), where the Court stated that it is "not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act."

58. 104 S. Ct. at 2808-09. See *supra* note 52 (the limitation upon who is an employee).

59. 104 S. Ct. at 2809.

60. 424 U.S. 351 (1976). Employment of illegal aliens under substandard terms and conditions was recognized by the Court as potentially diminishing the effectiveness of labor laws. *Id.* at 356-57.

61. 301 U.S. 1 (1937). The Court emphasized the need for employees to be entitled to NLRA protection in order to deal equally with their employer. *Id.* at 33.

62. 104 S. Ct. at 2809.

63. *Id.*

64. *Id.* See also *De Canas*, 424 U.S. at 359.

The Court noted that Congress has not adopted provisions in the INA making employment of illegal aliens unlawful. Specifically, section 1324(a)(3) of the INA states that "it is a felony to import, transport, or harbor an undocumented person." However, employment does not constitute harboring.⁶⁵

The majority stated that the inclusion of illegal aliens into the Act is compatible with the policies of the INA.⁶⁶ It stated that "[i]f an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened" and "if the demand for undocumented aliens declines, there may be fewer incentives for aliens themselves to enter in violation of federal immigration laws."⁶⁷

The most persuasive argument is reliance on the policy and purpose of the Act. As stated in section 1 of the Act, its purpose is to encourage collective bargaining and protection of the employees' right to organize.⁶⁸ If illegal aliens were not included in the Act, an employer could potentially use them to his advantage against the unions.⁶⁹ The employer would be able to hire illegal aliens knowing full well that they would be at his mercy, that if they caused any trouble he could have them deported and hire others in their place.⁷⁰ For employers with anti-union animus, this would be great incentive to hire illegal aliens.

Naturally flowing from this argument is the conclusion that there is no conflict between the NLRA and the INA. Including illegal aliens under the NLRA could reduce employer incentive to hire them and will reduce the aliens' incentive to enter the country illegally, as jobs will not be as readily available, thus furthering the policy of the INA to reduce illegal entries.⁷¹

The Court's weakest argument was that portion of the opinion which dealt with the definition of "employee." It stated that the term "employee" was "strikingly" broad and that the Board has con-

65. See *supra* note 53.

66. 104 S. Ct. at 2810. See 8 U.S.C. § 1182(a) (1982), which states: "[T]he following classes of aliens . . . shall be excluded from admission into the United States: . . . (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor . . ." See also *Kutchins & Tweedy, supra* note 53, at 360.

67. 104 S. Ct. at 2810.

68. See *supra* note 37.

69. See Comment, *supra* note 51, at 863-64.

70. *Id.*

71. 8 U.S.C. § 1324(a) (1976). See *supra* note 53.

sistently held that illegal aliens are employees within the meaning of the Act.⁷² This argument fails because sufficient rationale has never been established supporting any of these previous Board decisions.⁷³ The Board ultimately based its decision on a 1943 case, *In re U.S. Bedding*, which held that race was an impermissible factor to consider in forming a collective bargaining unit.⁷⁴ That case did not deal with the definition of employee under the Act, but the national policy of nondiscrimination.

3. Employer Commits a Constructive Discharge

The majority approached this question by citing section 8(a)(3) of the Act,⁷⁵ which makes it an unfair labor practice to encourage or discourage membership in any union. The Court recognized that it would be a violation of this section if an employer were to directly dismiss an employee because of the employee's participation in union activity.⁷⁶ Further, citing *NLRB v. Haberman Construction Co.*,⁷⁷ it is possible that an employer could create a working condition so intolerable that the employees' only recourse is to quit.⁷⁸

In *Sure-Tan*, the employer was not contesting the finding of anti-union animus, nor was he contesting the decision in *Haberman* that a constructive discharge is possible. Instead, he argued that his actions did not cause the workers' departure from the country.⁷⁹ The employer claimed that it was the employees' status as illegal aliens that was the "proximate cause" of their departure.⁸⁰

This argument was easily dispensed with by reasoning that the evidence did not support the employer's position. First, there was testimony by an INS agent, given before the Administrative Law Judge (ALJ) investigating the original charge, that the INS investigation was due solely to the employer's letter.⁸¹ Second, the Board did not contend that an employer may never report illegal aliens to the INS; only if evidence establishes that the reporting was in retaliation to an

72. 104 S. Ct. at 2808-09.

73. See *supra* note 69.

74. See *supra* note 10.

75. 104 S. Ct. at 2810; 29 U.S.C. § 158(a)(3) (1982).

76. *Id.*

77. 641 F.2d 351 (5th Cir. 1981).

78. 104 S. Ct. at 2810; 641 F.2d at 358. See also *J.P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 (4th Cir. 1972) (The employer, knowing that the employee was involved in the union organizing campaign, changed the employee's working conditions in such a way that the employee worked at a slower rate, therefore receiving less pay. The employee eventually quit.); *NLRB v. Holly Bra of California, Inc.*, 405 F.2d 870, 872 (9th Cir. 1969) (held that an employer cannot do constructively what the Act prohibits his doing directly).

79. 104 S. Ct. at 2810; Petitioner's Brief at 14.

80. 104 S. Ct. at 2810.

81. *Id.*

employee's union activity is it a violation of section 8(a)(3).⁸² Here, "[t]he record is replete with examples of Sure-Tan's blatantly illegal course of conduct to discourage its employees from supporting the Union."⁸³

Finally, the employer argued that he had a first amendment right to enforce the federal immigration laws established in the Supreme Court case of *Bill Johnson's Restaurant, Inc. v. NLRB*.⁸⁴ *Sure-Tan* is distinguishable in that the employer was not seeking relief from an injury caused by his employees, nor had he invoked the INA administrative process in order to redress any wrongs against him.⁸⁵ The employer was simply a private person who had suffered no alleged wrongs and sought enforcement of the immigration laws. "[I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."⁸⁶ Further, in *Bill Johnson's Restaurant*, the Court was concerned with the NLRA conflicting with a state interest, which was not at issue in *Sure-Tan*.⁸⁷

The decision of the majority on this question is convincing. The arguments put forward by the employer in *Sure-Tan* were not persuasive. There is substantial evidence that the employer contacted the INS due to the union activities of the employees. Such anti-union animus is sufficient to negate an otherwise legal action.⁸⁸ The *Bill*

82. *Bloom/Art Textiles, Inc.*, 225 N.L.R.B. 766, 769 (1976) (where the Board held that it was not a violation of the Act to dismiss an illegal alien who was a union member when circumstances show that the employer was genuinely fearful of violating a state law prohibiting hiring of illegal aliens).

83. 104 S. Ct. at 2810 (quoting *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 601-02 (7th Cir. 1982)).

84. Petitioner's Brief at 18. See also *Bill Johnson's Restaurant, Inc. v. NLRB*, 103 S. Ct. 2161 (1983).

85. In *Bill Johnson's Restaurant*, the employer was seeking relief from libelous statements and injury to his business. The Court stated the first amendment right protected in *Bill Johnson's Restaurant* is plainly a right of access to the courts for "redress of alleged wrongs." 103 S. Ct. at 2169. The Court further stated "[a]lthough it is not unlawful under the Act to prosecute a meritorious action, the same is not true of suits based on insubstantial claims—suits that lack . . . a 'reasonable basis.' Such suits are not within the scope of First Amendment protection." *Id.* at 2170.

86. *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1972); "The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 501 (1961)).

87. *Bill Johnson's Restaurant*, 103 S. Ct. 2161 (1983) (dealing with whether a state court lawsuit by the employer against union employees for alleged wrongs during a strike is an enjoined unfair labor practice).

88. 104 S. Ct. at 2811 n.6; *NLRB v. Transporation Management Corp.*, 103 S. Ct. 2469 (1983) (The case held that the employer has the burden to demonstrate, by a pre-

Johnson's Restaurant case was of little support to the employer in *Sure-Tan* due to the factual dissimilarity between the cases.

4. Six Months Back Pay is an Improper Remedy

The final question the majority dealt with is the remedial order of the Board as modified by the court of appeals. Section 10(c) of the Act gives the Board certain remedial powers.⁸⁹ In addition, previous Supreme Court cases have interpreted 10(c) as "vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review."⁹⁰ The main thrust of the majority's position on the remedial order is that the court of appeals overstepped the limits of its reviewing authority and, in so doing, created a remedy that even the Board had no power to devise.⁹¹

In *Sure-Tan*, the court of appeals, recognizing that the illegal aliens would most likely receive no back pay, suggested that the Board modify its order to include a minimum back pay award.⁹² The court of appeals speculated that the illegal aliens would have continued as employees for six months had the employer not reported them to the INS.⁹³ The Board subsequently modified its order, and the court of appeals affirmed.⁹⁴

This suggestion by the court of appeals created two problems. First, the court entered into the realm of policy, whereas its function is limited to review.⁹⁵ The proper action for the court should have been a remand to the Board for further determination of the proper

ponderance of the evidence, that the employee would have been fired even if he had not been involved with the union to avoid a finding of unfair labor practice.). The Court stated, "[w]here the employer has discharged an employee for two or more reasons, and one of them is union affiliation or activity, the Board has found a violation (of § 8(a)(3))." *Id.* at 2472 (quoting THIRD ANNUAL REPORT OF THE NLRB 70 (1938)).

89. 29 U.S.C. § 160(c) (1982). This report states in pertinent part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person . . . is engaging in any such unfair labor practice, then the Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act.

Id.

90. 104 S. Ct. at 2812. *See also* *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1940). "[C]ourts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Id.* at 194.

91. 104 S. Ct. at 2813.

92. 672 F.2d at 606.

93. *Id.*

94. *Id.*

95. 104 S. Ct. at 2813.

remedy.⁹⁶ Second, the remedy devised by the court of appeals went beyond effectuating the policies of the Act.⁹⁷

The Court, citing *NLRB v. Mackay Radio & Telegraph Co.*⁹⁸ and *Phelps Dodge Corp. v. NLRB*,⁹⁹ stated that the "back pay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices."¹⁰⁰ Here, the six month back pay award was not sufficiently tailored to the actual loss suffered by the employees, but was based on pure speculation.¹⁰¹ The Court stated that the proper course of action was to leave to the compliance proceeding the determination as to the amount of back pay due, if any.¹⁰²

It was stressed that in order to avoid a potential conflict between the NLRA and the INA, the Board must require that employees are legally in the country in order to receive back pay.¹⁰³ Thus, to allow the court of appeals' remedy of six months back pay would not only be outside their limited review authority, but also would create a conflict with the policy of the INA of discouraging unauthorized immigration.¹⁰⁴

The Court in similar fashion handled the court of appeals' other

96. *Id.* at 2813 n.10. *See also* *NLRB v. Food Store Employees*, 417 U.S. 1, 9-10 (1974) (the proper course is to remand back to the Board).

97. 104 S. Ct. at 2816. The Court stated in footnote 14 that "[i]n light of our disposition of this issue, we find it unnecessary to consider petitioners' claim that the minimum backpay awards are 'punitive,' and hence beyond the authority of the Board under *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 9-12 (1940)." Thus, it is left unanswered whether the court of appeals went so far as to create a "punitive" fine against the employer. However, looking at the language of the opinion, it appears to be punitive. The Court made reference to the court of appeals' comment that "a minimum amount of backpay . . . would effectuate the underlying purposes of the Act by providing some relief to the employees as well as a *financial disincentive against the repetition of similar discriminatory acts in the future.*" 104 S. Ct. at 2815 (emphasis added) (citing *NLRB v. Sure-Tan*, 672 F.2d at 606).

98. 304 U.S. 333 (1938).

99. 313 U.S. 177 (1940).

100. 104 S. Ct. at 2813-14. *See also* *Pennsylvania Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 51 (1935), *enforced*, 303 U.S. 261 (1938) (to determine the actual loss to employee, any wages earned during the time the employee was dismissed and the time of reinstatement is deducted from the total possible back pay).

101. 104 S. Ct. at 2814.

102. *Id.*

103. *Id.* at 2815. *See also* *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), which held that in devising remedies for unfair labor practices, the Board is obligated to take into account another "equally important Congressional objective." *Id.* at 47. In *Southern Steamship Co.*, the Court reversed the Board's finding of unfair labor practice for the ship captain's act of firing "employees" who had mutinied.

104. 104 S. Ct. at 2815. *See* 8 U.S.C. § 1182(a)(2) (1982).

modifications—requiring the receipt in mailing and holding the offers of reinstatement open for four years as plainly exceeding the limited authority of the court under the Act.¹⁰⁵

The decision reached on this question is well developed and supportable. It is firmly recognized that the court of appeals has limited review powers, and should remand to the Board if it questions any part of the Board's order.¹⁰⁶ In this case there is no question that the court of appeals overstepped its authority. It was pointed out that the Board had acquiesced to the remedy suggested by the court of appeals, and therefore the remedy should be affirmed as if the Board had devised it itself.¹⁰⁷ However, this argument misses the point. The fact here is that the court of appeals overstepped its authority by suggesting the remedy.¹⁰⁸

Furthermore, the remedy itself is not one even the Board has the power to devise.¹⁰⁹ The court of appeals admittedly relied on mere conjecture when it set six months as a minimum back pay award.¹¹⁰ It is established that when computing back pay, only actual losses may be recovered.¹¹¹ Here the court of appeals set forth no facts sufficient to support a six month minimum as an actual loss.¹¹²

The weakest part of the Court's argument occurred when it declared that the employees must be legally in the country in order to receive back pay. This position appears to create a double standard for the illegal alien: one, that they are protected by the NLRA; yet, two, there is no remedy that can ensure that they are protected.

However, this may not be the case. First, the Board can issue a cease and desist order against the employer. A violation of this order can result in contempt and subsequent fines.¹¹³ Second, the union that was elected as the bargaining representative will be recognized regardless of the fact that five of the eleven employees were forced to leave, thereby diminishing a potential majority vote.¹¹⁴ These two results seem to effectuate the policies of the Act. Future unfair labor practices may be discouraged by one, the possibility of a fine, and two, the fact that the employer is no better off than he was before.

105. 104 S. Ct. at 2816.

106. *Id.* at 2813 n.10. *See also* 417 U.S. 1, 9-10 (1974).

107. 104 S. Ct. at 2813 n.9.

108. *Id.* at 2813 n.10.

109. *Id.* at 2813.

110. 672 F.2d at 606.

111. 104 S. Ct. at 2813-14.

112. *Id.* at 2814. *See also id.* at 2814 n.11 (quoting *Sure-Tan, Inc.*, 234 N.L.R.B. at 1193) (where the Board had already rejected as "unnecessarily speculative" the ALJ's recommendation that a four week minimum period of back pay be awarded to the discharged employees).

113. *Id.* at 2815 n.13.

114. 583 F.2d at 361.

B. *The Dissent*

1. Deported Workers Are Not Entitled to Any Remedy

A separate opinion was written by Justice Powell, with whom Justice Rehnquist joined, in which they disagreed with the majority's finding that illegal aliens are employees under the Act. The dissent, however, agreed with the majority's remedial decision, as it provides less incentive for aliens to enter the country illegally.¹¹⁵

2. The Illegal Alien is Denied a Remedy

A second opinion was written by Justice Brennan.¹¹⁶ He concurred in part, agreeing that the illegal aliens are employees within the meaning of the Act and that the reporting of them to the INS was a constructive discharge. However, he disagreed with the remedy that was decided upon.

The dissent attacked the majority opinion on two points: first, that the majority ignored the fact that the Board had expressly urged the affirming of the back pay order,¹¹⁷ and second, that the majority concocted a new standard of review.¹¹⁸

On the first point the dissent stated that "no purpose would be served by remanding to the Board for further consideration of the remedy question."¹¹⁹ This position is based upon the fact that the Board in its brief advocated affirming the back pay award.¹²⁰ The dissent seemed to be sidestepping the central issue raised by the majority, that the court of appeals exceeded its limited review authority.¹²¹ Recognition was given to the general rule that "reviewing courts should remand to the Board rather than unilaterally imposing modifications of this sort."¹²² However, an exception to this general rule was suggested. Instead of a clear cut rule, the court of appeals would have a choice of whether or not to remand to the Board. Such discretion would invade the administrative territory given to the Board by Congress.¹²³

115. 104 S. Ct. at 2820 (Powell, J., concurring in part and dissenting in part).

116. 104 S. Ct. at 2816. Joining in the opinion were Justices Marshall, Blackmun, and Stevens.

117. *Id.* at 2817.

118. *Id.* The new standard considered whether the terms of the remedial order are "sufficiently tailored" to the unfair labor practice it is intended to redress.

119. *Id.*

120. *Id.* See Respondent's Brief at 11.

121. 104 S. Ct. at 2813.

122. *Id.* at 2820.

123. 29 U.S.C. § 160(e) (1982). See also *Phelps Dodge*, 313 U.S. at 194.

The second point was that the “sufficiently tailored” test, as applied by the majority, leads to an errant conclusion.¹²⁴ The dissent cited *NLRB v. Seven-Up Bottling Co.*,¹²⁵ which stated that “[w]hen the Board . . . makes an order of restoration by way of backpay, 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.’ ”¹²⁶ Furthermore, in response to the majority’s concern that the six month minimum was based upon pure speculation,¹²⁷ it was noted that the Board relied upon its own judgment when it decided to support the court of appeals’ suggestion. The Board also stated that this “award is no more speculative or conjectural than those developed in other situations”¹²⁸ What failed to be noted was that the Board previously rejected the ALJ’s recommendation of a four week minimum back pay award as being too speculative.¹²⁹

It was further advised that the employer should not be allowed to demand proof of an injury that he caused.¹³⁰ Citing *Graves Trucking, Inc.*,¹³¹ an employer should not be able to avoid paying a back pay award by claiming the employees were illegally in this country when it was his illegal conduct that caused their forced departure.¹³²

This argument is applicable under certain circumstances, yet here it should not be used because to do so would conflict with the policy of the INA.¹³³ The illegal alien would be allowed to receive benefit of his illegal presence in the country, even though he had been dis-

124. 104 S. Ct. at 2817.

125. *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

126. *Id.* at 346-47 (quoting *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). In *Sure-Tan*, the dissent felt the six month back pay remedy was a “wholly reasonable effort to effectuate” the policies of the Act. 104 S. Ct. at 2818.

127. 104 S. Ct. at 2814.

128. *Id.* at 2818. See Respondent’s Brief at 43-44. See, e.g., *Buncher v. NLRB*, 405 F.2d 787 (3d Cir. 1968), cert. denied, 396 U.S. 828 (1969) (allowing for an estimate to be made of the income that the employees would have earned but for the employer’s unfair labor practice).

129. 234 N.L.R.B. at 1193.

130. 104 S. Ct. at 2818.

131. 246 N.L.R.B. 344 (1979), enforced as modified, 692 F.2d 470 (1982).

132. *Id.* at 345, 692 F.2d 470, 474-77 (the Board forgives periods of unavailability that are due to the employer’s own illegal conduct). See also Respondent’s Brief at 45.

133. *Graves Trucking, Inc.*, 246 N.L.R.B. 344, 347-48 (1979), enforced as modified, 692 F.2d 470 (7th Cir. 1982) (employer not allowed to claim no responsibility for employee’s injuries inflicted during fight with another employee, when it was learned that the other employee had additional responsibility much like a supervisor); *NLRB v. Moss Planning Mill Co.*, 103 N.L.R.B. 414, 419, 427-29 (1953), enforced, 206 F.2d 557 (4th Cir. 1953) (The employee was fired for union activity, then subsequently reinstated with back pay. He was then beaten by his supervisor for refusing to take a compromise back pay amount. The court held that the employer could not avoid responsibility.); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) (this case did not deal with a similar issue, but in dicta stated the proposition that the wrongdoer cannot insist upon proof of the injury).

covered and forced to leave.¹³⁴

Further, the dissent claimed that the majority created a "disturbing anomaly" by first holding that the illegal aliens are protected by the Act, yet denying them any remedy.¹³⁵ It is stated that "[o]nce employers, such as petitioners, realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost back pay, their incentive to hire such illegal aliens will not decline, it will increase."¹³⁶

Finally, there is no conflict with the INA, as long as the reinstatement offers are conditioned upon the employees' legal reentry into the country.¹³⁷

The dissent failed to recognize that the majority opinion did not take away all remedies. A cease and desist order will be issued against the employer, and the traditional remedy of reinstatement, with or without back pay, can be ordered by the Board. The majority decision precluded awarding an automatic back pay award until actual proof of lost wages is established at the compliance hearing.¹³⁸ It is also interesting to note that the dissent's suggested remedy may be impractical because it is conditioned upon legal reentry of the aliens, and it is quite possible that they will not attain legal reentry.¹³⁹

The dissent, on similar grounds, disagreed with the majority on the

134. This would conflict with the policy of the INA of limiting the entry of aliens seeking to perform skilled or unskilled labor. Allowing an illegal alien to receive back pay has the same effect as allowing the illegal alien to work in the country. The alien may not be physically taking the job away from an American worker, but the back pay award may tax an employer to the point that he reduces his work force. The result may be less jobs available for the American worker.

135. 104 S. Ct. at 2819.

136. *Id.*

137. *Id.* at 2820.

138. *Id.* at 2815 n.13.

139. The aliens will only gain legal entry for the purpose of performing skilled or unskilled labor if:

[T]he Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that (A) there are not sufficient workers [in the United States] who are able, willing, qualified . . . and available . . . to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed.

8 U.S.C. § 1182(a)(14) (1982).

See also Gordon, *supra* note 25, at 54-58 for a review of the rights and the alternatives available to an alien seeking entry into the United States, and the rights of an alien found in the United States in violation of immigration law.

reinstatement period. It determined that the reinstatement should stand, and include a verified receipt.

V. IMPACT

The policy of the majority, which favored extending the NLRA to an illegal alien, is necessary to further the purpose of the NLRA¹⁴⁰ and the INA.¹⁴¹ *Sure-Tan* ensures that employers do not try to disrupt the work force's collective bargaining rights by singling out some of his employees as illegal aliens. Also, the incentive for aliens to illegally enter the country will decline as the availability of jobs declines,¹⁴² thus furthering the policy of the INA.¹⁴³

The ability to enforce this NLRA policy 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 practicality of the majority's remedial order, calling for a stronger stance to prevent future unfair labor practices by employers. However, in light of the fact that Congress has yet to state where the illegal alien workers fit into the scheme of NLRA rights and INA policies, the majority's reinstatement with possible back pay, conditioned on legal presence in this country, is more appropriate.

The likelihood still remains that Congress could step in and clarify how illegal alien workers should be treated. Congress could state that illegal aliens are workers within the meaning of the Act, or could remove them from the protection of the Act by imposing employer sanctions for knowing employment. Under the latter situation, once the employer learns that certain employees are illegally in the country, he would be required to fire them to avoid potential penalties.¹⁴⁴

Until Congress clarifies this question, this case allows the Board to continue supervision of the work place, encouraging all employees,

140. See Comment, *supra* note 51, at 864-65.

141. *Id.*

142. 104 S. Ct. 2810. See *supra* note 140.

143. *Plyler v. Doe*, 457 U.S. 202 (1982), a recent Supreme Court decision, afforded the illegal alien another legal benefit. It affirmed the Fifth Circuit Court of Appeals, holding for the first time that the equal protection clause of the fourteenth amendment applies to undocumented aliens. The immediate result was to open up free public education to the illegal alien coextensive with that offered to citizens and other legal residents. See Comment, *Illegal Aliens Have Right to Free Public Education Plyler v. Doe*, 102 S. Ct. 2382 (1982), 61 WASH. U.L.Q. 591 (1983-1984); Note, *Constitutional Law—Equal Protection—Public Education for Undocumented Aliens, Plyler v. Doe*, 29 WAYNE L. REV. 1487 (1983); Note, *Equal Protection, Education, and the Undocumented Alien Child: Plyler v. Doe*, 20 HOUS. L. REV. 899 (1983); Note, *Constitutional Law: The Equal Protection Clause: The Effect of Plyler v. Doe on Intermediate Scrutiny*, 36 OKLA. L. REV. 321 (1983).

144. See *DeCanas v. Bica*, 424 U.S. 351 (1975).

regardless of citizenship, to assert their rights, and encouraging all employers to recognize and honor these rights.

VI. CONCLUSION

Although the Board has consistently included illegal aliens as employees within the meaning of the Act, *Sure-Tan* is the first Supreme Court opinion on the issue. The outcome of this case assures the Board that it may continue to extend to the illegal alien worker all the rights guaranteed under the Act. The case holding prevents the forming of a subclass of workers at the mercy of the employer, having no rights. Such a situation could undermine the strength of the entire work force as a collective bargaining unit.

The long range impact of this case is unclear. It depends upon whether Congress comes forward with a federal policy on the illegal alien worker. If Congress does nothing, or states that the illegal alien worker is entitled to the protection of the Act, this decision will stand in support of the illegal alien's rights in the work place. However, if Congress adopts a resolution calling for sanctions to be imposed upon employers who hire illegal aliens, then the basis for extending the NLRA to include illegal aliens will fall. Once it becomes unlawful to employ the illegal alien, the application of the Act to the illegal alien would be in direct conflict with federal law.¹⁴⁵

It is left to be seen what may occur. Until then, this opinion by the Supreme Court was written in such a way as to allow the continued application of the NLRA to illegal aliens, while simultaneously avoiding a conflict with the INA.

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145. See Kutchins & Tweedy, *supra* note 53, at 359. See also Note, *The Simpson-Mazzoli Bill: Altering the Policy of Neglect of Undocumented Immigration from South of the Border*, 18 TEX. INT'L L.J. 347 (1983) (an overview of the possible effect the Simpson-Mazzoli Bill could have had if Congress enacted it into law).

