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UNDOCUMENTED DOES NOT EQUAL UNPROTECTED: THE
STATUS OF UNDOCUMENTED ALIENS UNDER THE NLRA SINCE
THE PASSAGE OF THE IRCA

Prior to the passage of the Immigration Reform and Control Act in 1986, the National Labor Relations Board and the courts consistently recognized undocumented alien workers as "employees" for purposes of protection under the National Labor Relations Act. Passage of the Immigration Reform and Control Act, however, cast doubt upon the continued validity of this policy because it prohibited the hire or continued employment of undocumented aliens. This Note analyzes the protection of undocumented aliens under the National Labor Relations Act in light of the passage of the 1986 Immigration Reform Act. The author argues that the prohibitions and sanctions imposed by the latter Act do not preclude the protection of undocumented aliens as "employees," but rather, the Reform Act and Labor Act can be used together to further the purpose of each.

THE National Labor Relations Board has established a policy of recognizing undocumented aliens¹ as "employees" under the National Labor Relations Act (NLRA).² It has awarded remedies to these aliens for unfair labor practices committed by both unions³ and employers.⁴ Reviewing courts have shown great deference to these Board decisions since the Board is charged by Congress with the interpretation and administration of the Act.⁵ In 1984, the United States Supreme Court upheld a Board decision which recognized an undocumented alien as an "employee" under

1. "Undocumented alien" is used in this Note to refer to an individual who is in the country illegally or who is in the country legally but is not authorized to work in the United States.

2. 29 U.S.C. §§ 151-168 (1986).

3. See *Local 300, Cosmetic and Novelties Workers' Union*, 257 N.L.R.B. 1335 (1981); *Duke City Lumber Co.*, 251 N.L.R.B. 53 (1980).

4. See *Sure-Tan, Inc.*, 234 N.L.R.B. 1187 (1978), *modified*, 672 F.2d 592 (7th Cir. 1982), *rev'd in part and remanded*, 467 U.S. 883 (1984); *Apollo Tire Co.*, 236 N.L.R.B. 1627 (1978), *enforced*, 604 F.2d 1180 (9th Cir. 1979); *Sure-Tan, Inc.*, 231 N.L.R.B. 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978); *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976); *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094 (1973).

5. See *Sure-Tan*, 467 U.S. at 891; *Apollo Tire Co.*, 604 F.2d at 1183.

the Act.⁶ The Court cited several reasons for its holding, including the fact that the employment relationship between an employer and an undocumented alien was not illegal.⁷

In 1986, Congress passed a bill amending the Immigration and Nationality Act (INA).⁸ This bill, the Immigration Reform and Control Act (IRCA), imposes both criminal and civil sanctions on employers who hire or continue to employ those known to be undocumented aliens.⁹ Thus, one of the Supreme Court's reasons for upholding the Board policy was removed. Prior to the passage of the IRCA, some commentators speculated that such sanctions against employers would make NLRA protection of undocumented aliens impossible.¹⁰

This Note will argue that prohibiting the employment of undocumented aliens does not in fact preclude their protection as "employees" under the NLRA. Rather, the two policies can blend to further the purposes of both the NLRA and the IRCA. This Note begins by reviewing Board decisions which have extended NLRA protection to undocumented aliens and court decisions which have affirmed this policy. Next, the IRCA and the speculations made prior to its passage will be discussed. Finally, arguments that the IRCA employer sanctions should not prohibit the protection of undocumented aliens as "employees" under the NLRA will be presented and analyzed.

I. TREATMENT OF UNDOCUMENTED ALIENS UNDER THE NLRA PRIOR TO THE IRCA

A. Board Treatment

Board protection of undocumented aliens as "employees" under the NLRA evolved from prior decisions which protected all aliens under the Act.¹¹ In *Lawrence Rigging, Inc.*,¹² the Board

6. *Sure-Tan*, 467 U.S. at 894.

7. *Id.* at 893.

8. 8 U.S.C. § 1324 (1986).

9. 8 U.S.C. § 1324a (1986).

10. See Kutchins & Tweedy, *No Two Ways About It: Employer Sanctions Versus Labor Law Protections for Undocumented Workers*, 5 INDUS. REL. L.J. 339, 341-42 (1983); Note, *Striking a Balance Among Illegal Aliens, the INA, and the NLRA: Sure-Tan v. N.L.R.B.*, 12 PEPPERDINE L. REV. 679, 696 (1985); Comment, *Employment Rights of Undocumented Aliens: Will Congress Clarify or Confuse an Already Troublesome Issue?*, 14 CAP. U.L. REV. 431, 452, 457 (1985).

11. See *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094 (1973). See also Logan & Pax-

held that the authorization card of an undocumented alien should be counted in determining whether the petitioning union represented a majority of employees in the election unit. The Board explicitly rejected the assumption of the administrative law judge that the card should be disregarded since it was signed by an alien who lacked working papers. The Board based its decision on two considerations: 1) The eligibility of noncitizens¹³ to vote in a union election had been established in a previous case,¹⁴ and 2) nothing in the Act precluded undocumented aliens from its definition of "employee."¹⁵

Since *Lawrence Rigging*, the Board has consistently held that undocumented aliens are "employees" under the NLRA and has awarded a variety of remedies for both employer¹⁶ and union¹⁷

ton, 55 N.L.R.B. 310 (1944)(Board held that noncitizens could not be excluded from union elections since the Act did not differentiate between citizens and noncitizens).

12. 202 N.L.R.B. 1094 (1973).

13. The term "noncitizens" includes both documented and undocumented aliens.

14. *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094, 1095 (1973)(citations omitted).

15. The Act defines "employee" as including:

any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, 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, but shall not include any individual employed as an agricultural laborer, or 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, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3)(1982)(citations omitted).

16. *N.L.R.B. v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979)(Employer, who discharged undocumented aliens because they filed a complaint charging failure to pay overtime, was ordered to cease and desist and to reinstate with backpay those discharged); *La Mousse, Inc.*, 259 N.L.R.B. 37 (1981)(Employer organized an INS raid in order to retaliate against undocumented aliens who supported the union. Board issued order to cease and desist, recognize and bargain with the union, and reinstate with backpay the undocumented aliens, who had all voluntarily left the country and subsequently reentered again illegally); *Hasa Chem., Inc.*, 235 N.L.R.B. 903 (1978)(Employer, who threatened to report suspected undocumented aliens to the INS if they voted for the union, was ordered to cease and desist); *Sure-Tan, Inc.*, 234 N.L.R.B. 1187 (1978), *modified*, 672 F.2d 592 (7th Cir. 1982), *rev'd in part and remanded*, 467 U.S. 883 (1984)(Employer reported undocumented aliens who had voted for the union to the INS. The reported employees voluntarily left the country to avoid deportation. Board ordered employer to cease and desist and reinstate with backpay those reported to the INS. The determination of the appropriate amount of backpay was left until the compliance proceedings); *Sure-Tan, Inc.*, 231 N.L.R.B. 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978)(Employer refused to bargain with union elected by work unit because majority of those who voted for union were undocumented

unfair labor practices. In *Amay's Bakery & Noodle Co.*,¹⁸ the Board awarded reinstatement and back-pay to undocumented aliens who had been discriminatorily discharged, despite a California statute which prohibited the employment of such aliens.¹⁹ The employer argued that the order would force him to violate the state law, and, thus, should not be issued. The Board, however, held that the order would only force the employer to violate the law if the California Supreme Court overturned a lower court ruling that the statute was invalid;²⁰ in which case the employer could petition for a modification of the order at the compliance stage.²¹ The Board also issued a cease and desist order to prevent the employer from threatening to report the undocumented aliens to the INS if the union was elected.²²

In *Sure-Tan, Inc.*,²³ the employer *did* report undocumented aliens who voted for the union to the INS. Even though the employees left the country voluntarily to avoid deportation and thus "quit" their jobs, the Board held that the employer violated the Act by constructively discharging them. Due to the retaliatory nature of his acts, the employer was ordered to reinstate the employ-

aliens. Board ordered employer to cease and desist refusal to bargain); *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976)(Employer, who discharged undocumented aliens in retaliation for union activity, was ordered to cease and desist, recognize, and bargain with the union, and reinstate those discharged with backpay).

17. Local 300, Cosmetic and Novelty Workers' Union, 257 N.L.R.B. 1335 (1981) (Board issued a cease and desist order against a union whose agent threatened to report suspected undocumented aliens to the INS if they did not vote for the union); *Duke City Lumber Co.*, 251 N.L.R.B. 53 (1980) (Board dismissed the petition of a union which sought to represent an employee group excluding undocumented aliens).

18. 227 N.L.R.B. 214 (1976).

19. Section 2805(a) of the California Labor Code provides:

No employer shall knowingly employ an alien who is not entitled to lawful residence in the United States if such employment would have an adverse effect on lawful resident workers.

CAL. LAB. CODE § 2805(a) (West Supp. 1988).

20. *See Delores Canning Co. v. Howard*, 40 Cal. App. 3d 673, 115 Cal. Rptr. 435 (1974). *See generally* *DeCanas v. Bica*, 424 U.S. 351 (1976)(Supreme Court held that the California Statute was not unconstitutional *per se* and remanded to the California Court of Appeals, which never reheard the case).

21. The Board thus indicated that a valid state statute prohibiting the employment of undocumented aliens would not change the decision that such aliens were protected by the Act, but might alter the remedies available.

22. *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214, 220-21 (1976). *Accord* *Hasa Chem., Inc.*, 235 N.L.R.B. 903, 913 (1978).

23. 234 N.L.R.B. 1187 (1978), *modified*, 672 F.2d 592 (7th Cir. 1982), *rev'd in part and remanded*, 467 U.S. 883 (1984).

ees with back-pay.²⁴

B. Court Treatment

The Board's decision in *Sure-Tan* was subsequently affirmed by the United States Supreme Court.²⁵ Noting a desire to defer to any reasonably defensible Board interpretation of the NLRA, the Court concluded that the Board's interpretation was supported by both the statutory language and the underlying policies of the Act.²⁶ The Court viewed the Board's interpretation as reasonably defensible since the statute defines "employee" very broadly and does not list undocumented aliens in the clearly specified exceptions.²⁷ Furthermore, the Court reasoned that:

If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a sub-class of workers without a comparable stake in the collective goals of their legally resident co-workers, thereby eroding the unity of all the employees and impeding effective collective bargaining.²⁸

Thus, extending coverage to undocumented aliens furthers the purpose of the Act, which is to encourage and protect the collective bargaining process.²⁹

In addition, the Court held that application of the Act to undocumented aliens did not conflict with the immigration laws, but, in fact, furthered the purpose of the INA. The Court reasoned that NLRA protection of undocumented aliens does not conflict with the statutory language of the INA since there is no provision in the INA which makes it illegal to employ undocumented aliens.³⁰ Furthermore, the Court concluded that such protection furthers the underlying purpose of the INA — "to preserve jobs for American workers"³¹ — by eliminating or at least greatly re-

24. *Id.* at 1188.

25. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984).

26. The Court wished to defer to any reasonably defensible interpretation by the Board, since it is the agency charged by Congress with interpretation and administration of the Act. *Id.* at 891.

27. *Id.* at 891-92. For the statutory definition of "employee" see *supra* note 15.

28. *Sure-Tan*, 467 U.S. at 892.

29. See 29 U.S.C. § 151 (1986). For a statement of the legislative purpose of the NLRA, see *infra* text accompanying note 73.

30. *Sure-Tan*, 467 U.S. at 892-93.

31. *Id.* at 893.

ducing an employer's incentive to hire undocumented aliens,³² and, in turn, reducing the alien's incentive to enter the country illegally by decreasing opportunities for employment.³³

The Supreme Court also affirmed the Board's determination that the employer's conduct constituted a constructive discharge. The Court found that the employer's main purpose in reporting the aliens to the INS was retaliation, and that his otherwise legitimate reason, to fulfill his obligation to report violations, of the immigration laws was a mere pretext.³⁴ The Court further held that it was not solely the reporting or discharging of the undocumented aliens which constituted a violation of the Act, but the anti-union animus with which it was done.³⁵

Due to the unavailability of the aliens for employment, the Seventh Circuit Court of Appeals altered the remedies originally awarded by the Board in the *Sure-Tan* case.³⁶ The Supreme Court agreed that an award of reinstatement had to be conditioned on the employee's legal readmittance into the United States³⁷ and that back-pay had to be tolled during any period when the employee was not legally entitled to be present or employed in the United States.³⁸ The Court also held, however, that the appellate court had overstepped its bounds by setting a minimum back-pay award and requiring that the reinstatement offers be left open for four years.³⁹ The Court emphasized the Board's

32. "If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to resident workers, any incentive to hire such illegal aliens is correspondingly lessened." *Id.*

33. "In turn, if the demand for undocumented aliens declines, there may be fewer incentives for aliens themselves to enter in violation of the federal immigration laws." *Id.* at 893-94.

34. *Id.* at 895 n.6.

35. *Id.* at 896.

36. *Sure-Tan, Inc. v. N.L.R.B.*, 672 F.2d 592, 606 (7th Cir. 1982), *rev'd in part and remanded*, 467 U.S. 883 (1984) (The appellate court held that the remedies of reinstatement and backpay had to be conditioned on the employee being legally present and authorized to work in the United States. The Court modified the Board's order, requiring the employer to: 1) pay the employees a minimum of six months backpay, and 2) extend the employees a reinstatement offer, to be written in Spanish, which would remain open for four years, giving the aliens an opportunity to reenter the country legally.)

37. This condition has been construed narrowly by some lower courts to mean that reinstatement cannot be awarded to an alien who has left the country. Those undocumented aliens who have remained within the country, however, are *available* for work and can be awarded reinstatement. *See e.g.*, *Local 512, Warehouse and Office Workers' Union v. N.L.R.B.*, 795 F.2d 705 (9th Cir. 1986).

38. *Sure-Tan*, 467 U.S. at 903.

39. *Id.* at 904-05.

“broad discretion to devise remedies that effectuate the policies of the Act”⁴⁰ and remanded the case to the Board for determination of a remedy consistent with its opinion subject to the condition that the alien be legally available for work.⁴¹

Lower courts have also held undocumented aliens to be “employees” for purposes of the NLRA.⁴² In *NLRB v Apollo Tire Co.*,⁴³ the Ninth Circuit Court of Appeals held that “employed aliens, regardless of whether or not they have working papers, are ‘employees’ as defined in Section 2(3) of the National Labor Relations Act.”⁴⁴ The court based its conclusion on many of the same considerations discussed in *Sure-Tan*. In addition, the court considered the appropriateness of a Board determination regarding an alien’s legal status. The court concluded that “[q]uestions concerning the status of an alien and the validity of his papers are matters properly before the Immigration and Naturalization Service.”⁴⁵ The Court reasoned that the extension of NLRA protection to undocumented aliens prevents the Board from having to delve into areas outside its expertise and “insures that an employer is not permitted to commit unfair labor practices in the knowledge that the Board is powerless to remedy them.”⁴⁶

II. PASSAGE OF THE IRCA AND SPECULATION ON ITS EFFECT

Sanctions for employing undocumented aliens have been proposed by every Congress since 1972.⁴⁷ Finally, in 1986, the ninety-ninth Congress passed a bill including such sanctions.⁴⁸ This bill, the Immigration Reform and Control Act, amended the already existing Immigration and Nationality Act. The pertinent section

40. “The Court has repeatedly interpreted this statutory command [29 U.S.C. § 160(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.” *Id.* at 898-99 (citing *N.L.R.B. v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969); *Fiberboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964); *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941)).

41. *Id.* at 906.

42. See *Sure-Tan, Inc. v. N.L.R.B.*, 672 F.2d 592 (7th Cir. 1982), *rev'd in part and remanded*, 467 U.S. 883 (1984); *N.L.R.B. v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979); *Sure-Tan, Inc. v. N.L.R.B.*, 583 F.2d 355 (7th Cir. 1978).

43. 604 F.2d 1180 (9th Cir. 1979).

44. *Id.* at 1181.

45. *Id.* at 1183.

46. *Id.* (footnote omitted).

47. Kutchins & Tweedy, *supra* note 10.

48. 8 U.S.C. § 1324a (1986).

of the amendment provides: "It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States . . . an alien knowing the alien is an unauthorized alien⁴⁹ . . . with respect to such employment . . ." ⁵⁰ The provision also makes it illegal for an employer to continue to employ an alien knowing he is, or has become, unauthorized.⁵¹ In addition, Congress provided a verification system⁵² and made it a violation of the Act to hire anyone without using the system to verify the employee's work eligibility.⁵³ Thus, Congress placed a burden on *employers* to make a preliminary determination of an alien's status before hiring him.

Although no authoritative work on the implications of the IRCA has been published to date, speculations were made while the various proposals for employer sanctions were pending.⁵⁴

A. Speculation Prior to *Sure-Tan*

In 1982, the Simpson-Mazzoli Bill,⁵⁵ which contained employer sanctions, was passed by the Senate but shelved in the House of Representatives.⁵⁶ Albert Kutchins, an attorney and former organizer for the Service Employees International Union, and Kate Tweedy, attorney for the Central American Refugee Defense Fund, wrote an article urging Congress to reject the sanctions.⁵⁷ The authors asserted that adoption of employer sanctions would eliminate the more effective policy of extending NLRA protection to undocumented workers.⁵⁸ They claimed that prior court decisions indicated that the two policies were "mutually exclusive."⁵⁹ The authors interpreted appellate court decisions upholding the Board's policy as being based *primarily* on the nonex-

49. The Act defines an "unauthorized alien" as an alien who is not "(A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this Act or by the Attorney General." *Id.* § 1324a(h)(3).

50. *Id.* § 1324a(a)(1)(A).

51. *Id.* § 1324a(a)(2).

52. *Id.* § 1324a(b).

53. *Id.* § 1324a(a)(1)(B).

54. See sources cited *supra* note 10.

55. For the text of the proposed legislation, see 128 CONG. REC. 21,671 (1982).

56. Kutchins & Tweedy, *supra* note 10, at 339.

57. *Id.*

58. *Id.* at 342 (the authors reason that, while employer sanctions penalize employers for hiring undocumented aliens extending NLRA protection to such aliens removes "the incentive which causes employers to prefer undocumented workers." *Id.* at 341.).

59. *Id.* at 341.

istence of legislation prohibiting employment of undocumented aliens. Noting that “[a] federal employer sanction law . . . would remove this key legal basis from the courts’ holdings,” the authors concluded that courts would no longer be able to affirm Board decisions which defined undocumented aliens as “employees” under the NLRA.⁶⁰

The authors acknowledged that in some cases courts *had* extended NLRA protection to undocumented aliens, despite state laws which imposed employer sanctions.⁶¹ These results were not attributed to court determinations that NLRA protection was compatible with statutes making the employment of undocumented aliens illegal, but rather, were attributed to the questionable validity of the statutes⁶² and lack of enforcement.⁶³ Furthermore, Kutchins and Tweedy claimed that even if courts found NLRA protection of undocumented aliens theoretically compatible with valid employer sanctions, the two policies would still be incompatible *in practice*. Noting that the Board is dependent on employee complaints to “locate culpable employers,”⁶⁴ the authors argued that if the employment of undocumented aliens is made illegal, undocumented aliens, who are the victims of unfair labor practices, will not file complaints with the Board because they will fear termination and deportation upon discovery of their alien status.⁶⁵

In addition, Kutchins and Tweedy argued that when an unfair labor practice against an undocumented alien is reported, the Board will be powerless to award a remedy. Basing this argument on the “accommodation doctrine” of *Southern Steamship*,⁶⁶ the authors suggested that awarding reinstatement and back-pay to undocumented aliens would directly contradict a law which prohibits their employment in the United States. Thus, the authors concluded, since an undocumented alien faces termination and deportation as a result of filing a complaint, and since the discriminatorily discharged alien cannot be awarded reinstatement or

60. *Id.*

61. *Id.* at 347-48 n.43.

62. *Id.* at 349.

63. *Id.* at 349-50.

64. *Id.* at 367-68 (footnotes omitted).

65. *Id.* at 361.

66. *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942)(the *accommodation doctrine* precludes the Board from issuing an order which would contradict a valid federal statute in another area of law).

back-pay, undocumented aliens will not report labor law violations against them. Therefore, their protection as "employees" under the NLRA becomes meaningless with the passage of employer sanctions.

B. Speculation After *Sure-Tan*

The language used by the Court in *Sure-Tan* suggests that it might not uphold NLRA protection for undocumented aliens in the face of INA provisions prohibiting their employment. Justice O'Connor, the author of the majority opinion, wrote:

Counterintuitive though it may be, we do not find any conflict between application of the NLRA to undocumented aliens and the mandate of the Immigration and Nationality Act (INA) For whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization Since the employment relationship between an employer and an undocumented alien is hence not illegal under the INA, there is no reason to conclude that application of the NLRA to employment practices affecting such aliens would necessarily conflict with the terms of the INA.⁶⁷

Some commentators have alleged that the Court's use of the language "counterintuitive" and "for whatever reason" indicates that the adoption of employer sanctions would result in the Court's denial of NLRA protection for undocumented aliens.⁶⁸ One such commentator suggests that "[a] change in the law could upset the balance and tip the scale in favor of the position that one who enters the country illegally is present at his or her own risk and therefore outside the protection of the labor law."⁶⁹

III. EMPLOYER SANCTIONS DO NOT ELIMINATE NLRA PROTECTIONS FOR UNDOCUMENTED ALIENS

Despite the prohibition of undocumented alien employment, it is still possible for the Board to recognize such aliens as "employees" under the NLRA. The passage of the IRCA does not

67. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 892-93 (1984).

68. *See Comment supra* note 10, at 452.

69. *Id.* at 457.

alter the Board interpretation of "employee" or the conclusion that extending protection to undocumented aliens furthers the purpose of the NLRA. Furthermore, the inclusion of employer sanctions does not change the purpose of the INA so that it is no longer furthered by the Board's policy. The only factor which may be affected is the conclusion that NLRA protection of undocumented aliens does not conflict with the terms of the INA.

A. Policy Compatibility With Statutory Language of NLRA

The adoption of the IRCA has not altered the considerations which led the *Sure-Tan* Court to conclude that it was reasonable to include undocumented aliens under the NLRA definition of "employee." Although Congress could have indicated an intention to exclude undocumented aliens from NLRA protection, it did not do so in either the statutory language of the IRCA or an amendment to the NLRA. In fact, the legislative history of the IRCA indicates a strong Congressional intent to *preserve* the Board's policy of protecting undocumented aliens as "employees" under the NLRA.

The House Judiciary Committee report stated:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising [sic] their rights before such agencies or for engaging in activities protected by existing law. In particular, the employer sanctions provisions are not [intended] to limit in any way the scope of the term "employee" in Section 2(3) of the National Labor Relations Act (NLRA), as amended, or of the rights and protections stated in sections seven and eight of that Act. As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, . . . application of the NLRA "helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to the standard terms of employment."⁷⁰

Similar language can be found in the House Report of the Committee on Education and Labor:

70. H.R. 682, 99th Cong., 2d Sess. pt. 1, at 58 (1986)(quoting *Sure-Tan*, 467 U.S. at 893), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 5649, 5662.

In addition, the committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as . . . the National Labor Relations Board . . . to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by these agencies. To do otherwise would be counterproductive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.⁷¹

Although these reports may not reflect the individual intentions of *each* legislator, absent any statement to the contrary in the legislative history,⁷² it is reasonable to infer from them an intention of the legislature, as a whole, to preserve Board policy.

B. Furtherance of NLRA Purpose

The purpose of the NLRA is

to eliminate . . . obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.⁷³

Excluding undocumented aliens from NLRA protection will frustrate the Act's purpose by weakening the bargaining unit.

As the Court noted in *Sure-Tan*, "acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions."⁷⁴ If undocumented aliens are not protected by the NLRA, they will create a sub-class of workers which may be exploited by employers to undermine unions and to gain a competitive edge in the product market, despite the employer sanctions imposed by

71. H.R. 682, 99th Cong., 2d Sess. pt. 2, at 8-9 (1986).

72. See generally S. REP. NO. 132, 99th Cong., 2d Sess. (1985); H.R. REP. NO. 682, 99th Cong., 2d Sess., pts. 1-5 (1985); H.R. CONF. REP. NO. 1000, 99th Cong., 2d Sess. (1986) reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 5840 (these congressional reports are silent with respect to any intent on the part of the legislature to disturb Board policy).

73. 29 U.S.C. § 151 (1986).

74. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 892 (1984).

the IRCA.

The most effective tool of labor unions is the strike.⁷⁵ Employment of this tactic forces an employer to choose between complying with union demands or attempting to operate with non-union labor.⁷⁶ As the number of non-union workers available decreases, the effectiveness of a strike (or even the mere threat of a strike) increases.⁷⁷ Conversely, as the availability of non-union workers increases, the effectiveness of a strike decreases. If undocumented aliens are not protected as "employees" under the NLRA, they will be faced with a choice: They can be part of the non-union work force which decreases the effectiveness of a union strike (as employers will pressure them to do), or they can refuse to work for a struck employer and likely lose their jobs. The vast majority of undocumented aliens will choose the former alternative since the IRCA will make new jobs even harder to obtain. Therefore, if undocumented aliens are not afforded NLRA protection, they will be exploited and manipulated by employers who are willing to risk the relatively small penalties for first offenses under the IRCA in order to reap the benefits of undermining the union. In a mixed working environment,⁷⁸ unfair labor practices against undocumented aliens would undermine labor unions in a more direct way.

If illegal aliens were not included in the Act, an employer could potentially use them to his advantage against the unions. 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.⁷⁹

Thus, undocumented aliens would be easily "persuaded" by the employer not to join the union. As a result, the authorized workers who desired to join a union would be restricted in their section seven rights⁸⁰ by employer interference.⁸¹

75. "To put it in a phrase, the strike or the fear of a strike is the motive power that makes collective bargaining operate." A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 481 (10th ed. 1986).

76. A. REES, *THE ECONOMICS OF TRADE UNIONS* 45 (rev. 2d ed. 1962).

77. *See id.*

78. A mixed working environment is an employee work force made up of both undocumented aliens and authorized workers.

79. Note, *supra* note 10, at 687 (footnotes omitted).

80. Section 7 of the N.L.R.A. states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

In addition to undermining the union, an employer could obtain a competitive edge in the product market by exploiting unprotected undocumented aliens. As Albert Rees, author of *The Economics of Trade Unions* stated:

[A]s the union raises wages, it will in fact set in motion forces tending to reduce the number of members at work. If the industry is not completely organized, non-union firms will expand at the expense of union firms. In any case, the employers using the least labor to produce a given output will tend to expand at the expense of others Moreover, each employer will have an incentive to use more or better equipment or more supervision or perhaps better materials to cut down his use of the labor whose price has risen. Finally, as the price of the product rises, the consumer will tend to use less of it and will turn instead to substitute products.⁸²

Thus, if undocumented aliens are not protected as "employees" under the NLRA, an employer could employ such aliens at sub-standard wages and working conditions (knowing they are powerless to remedy the situation), and thereby reduce labor costs.

Reduction in labor costs will benefit the employer in one of two ways. Either he will continue to sell his product at the same price as competitors who do not have the labor cost advantage, and thus, obtain a larger return margin, or he will sell his product for less than his competitors and thereby obtain an increased market share.⁸³ In either case, the employer has an incentive to take advantage of unprotected undocumented aliens despite the IRCA sanctions, and, therefore, neither the NLRA nor the INA purpose is furthered.

C. Practical Problems

Kutchins and Tweedy argue that the imposition of employer sanctions makes NLRA protection of undocumented aliens mean-

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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1986).

81. Among other things, § 8 of the N.L.R.A. prohibits employer interference with an employee's exercise of his rights under § 7. 29 U.S.C. § 158(a)(1) (1986).

82. A. REES, *supra* note 76, at 49.

83. *Id.*

ingless due to the unavailability of particular remedies.⁸⁴ The authors, however, fail to realize two important things. First, the remedy of reinstatement is not entirely unavailable to an undocumented alien. Second, there are other effective remedies available to the Board.

1. Reinstatement

Kutchins and Tweedy contend that the adoption of employer sanctions will "eviscerate" the Board's power to order reinstatement of a discriminatorily discharged undocumented alien.⁸⁵ They reason that "the Board must, under *Southern Steamship*, accommodate other federal statutes in issuing remedial orders,"⁸⁶ and, therefore, cannot order reinstatement of an undocumented alien when it is illegal for the employer to hire (or rehire) the alien with knowledge of his undocumented status.

The availability of reinstatement, however, was not affected by the passage of the IRCA. When the Board concludes that an undocumented alien was fired in order to impede employee organization,⁸⁷ the remedy of reinstatement can still be ordered. Naturally, the Board cannot order the employer to violate the IRCA by rehiring the alien while he is still unauthorized to work in the United States. It can, however, order that a reinstatement offer be made and left open until such time as the alien can obtain the necessary authorization.⁸⁸ This remedy is no different than the one available to the Board *before* the passage of the IRCA following the *Sure-Tan* decision.

It was the *Sure-Tan* decision, and not the passage of the IRCA, which also changed the availability of back-pay. The Court required that back-pay be tolled during any period when

84. Kutchins & Tweedy, *supra* note 10, at 366-69.

85. *Id.* at 360.

86. *Id.* at 360-61 (footnotes omitted).

87. The employer's intent can be determined by the particular facts of the case. For example, an employer who discharges *all* undocumented aliens in his employ, including those who did not support the union, and replaces them with authorized workers will be found to have done so in order to comply with IRCA. See *Handling Equip. Corp.*, 209 N.L.R.B. 64 (1974). On the other hand, an employer, who discharges only those undocumented aliens who supported the union or all undocumented aliens plus the authorized workers supporting the union, will be found to have done so for the purpose of impeding the union or retaliating against those who supported it.

88. The *Sure-Tan* Court did not eliminate this remedy, it merely held that it was under the discretion of the Board, not the appellate court, to order it. See *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 905 (1984).

the employee was not legally entitled to be present or employed in the United States.⁸⁹ Thus, it appears that the only time back-pay can be awarded to a discriminatorily discharged undocumented alien, is when he has subsequently obtained the necessary work authorization and the employer has refused to comply with a reinstatement order issued by the Board.

The limited availability of reinstatement and back-pay, however, should not preclude undocumented aliens from NLRA protection. The focus of the NLRA, after all, is not on individual rights so much as on the rights of employees in the aggregate to organize.⁹⁰ The unavailability of back-pay may become relevant, however, when one considers Kutchins and Tweedy's argument that such aliens will not report labor law violations because there is nothing for them to gain by doing so. What Kutchins and Tweedy fail to realize is that authorized workers who wish to organize, or individuals outside the workplace who are involved in the organization process, can alert the Board of "culpable employers."

2. Other Remedies

Limitations on reinstatement and back-pay only become relevant when the labor law violation is a discriminatory discharge. There are many other employer activities short of termination, however, which constitute a violation of the NLRA. For example, an employer violates the Act when he refuses to bargain with a union elected by a majority of the work unit,⁹¹ threatens employees,⁹² promises benefits if the union is defeated,⁹³ excludes employees from the union election,⁹⁴ or reports undocumented aliens to the INS in retaliation for union activity.⁹⁵ The Board has devised several remedies, other than reinstatement and back-pay,

89. *Sure-Tan*, 467 U.S. at 903.

90. See *Darlington Mfg. Co. v. N.L.R.B.*, 397 F.2d 760 (4th Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969).

91. 29 U.S.C. § 158(a)(5) (1986). See *Sure-Tan Inc.*, 231 N.L.R.B. 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978).

92. 29 U.S.C. § 158(a)(1) (1986). See *Hasa Chem., Inc.*, 235 N.L.R.B. 903 (1978).

93. 29 U.S.C. § 158(a)(1) (1986). See *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405 (1964).

94. See *Lawrence Rigging, Inc.*, 202 N.L.R.B. 1094 (1973); *Logan & Paxton*, 55 N.L.R.B. 310 (1944).

95. See *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883 (1984); *La Mousse, Inc.*, 259 N.L.R.B. 37 (1981).

which it can effectively use to stop employer violations in cases which do or do not include claims of discriminatory discharge.

First, the Board can issue a cease and desist order.⁹⁶ The order is a command for the employer to discontinue those activities which the Board determines to be in violation of the Act. This remedy furthers the purpose of the Act regardless of the type of case in which it is invoked. In a case of discriminatory discharge, the employer is ordered to stop the termination of undocumented aliens in retaliation for union activity. This is not the same, however, as ordering him to retain all undocumented aliens in violation of the IRCA. Although the employer could retain all undocumented aliens still employed and risk liability under the IRCA, he could also terminate them all — so long as his motivation for doing so is to comply with the IRCA and not to retaliate for union activity. Either way the advantages of exploiting such aliens are eliminated and the bargaining unit is strengthened.⁹⁷ In a case which does not involve discriminatory discharge, the cease and desist order also eliminates the manipulation of undocumented aliens by preventing the employer from engaging in other activities to discourage union activity (i.e. threatening to fire aliens or report them to INS).

In addition to a cease and desist order, the Board can demand that an employer recognize and bargain with a particular union when it can be shown that the union had majority support at one time.⁹⁸ (This remedy is only used, however, when the labor law violations of the employer have been so egregious that a fair election is no longer possible.) Counting the undocumented aliens as “employees” makes a bargaining order an effective tool in eliminating the effects of employer manipulation of such employees because it counts the choices of the undocumented aliens *prior* to the coercion.

Despite the limitations on reinstatement and back-pay, the Board still may use those remedies as well as other equally effective remedies to protect undocumented aliens from unfair labor practices. This protection creates a disincentive for employers to attempt to impede employee unionization via the use and manipulation of undocumented aliens. As a result, the Board’s policy furthers the purpose of protecting the right to engage in collective

96. 29 U.S.C. § 160(c) (1986).

97. See *supra* text accompanying notes 75-83.

98. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 610 (1969).

bargaining under the NLRA.

D. Policy Compatibility With the IRCA

In *Sure-Tan*, the Supreme Court held that protection of undocumented aliens under the NLRA did not conflict with the terms of the INA since the employment relationship between an employer and such an alien was not illegal under the INA.⁹⁹ The adoption of amendments to the INA making it illegal to employ an undocumented alien, however, does not automatically lead to the conclusion that the two policies conflict or that NLRA protection is no longer available to aliens unauthorized to work in this country. When an employer, who has hired or continued to employ an alien whom he knows to be unauthorized, commits an unfair labor practice against that alien, he has violated *both* the NLRA and the IRCA. It is not inconsistent to hold a person liable under two different laws for two different acts.

The only factual pattern which appears to create conflict between the two policies is when an employer terminates the employment of an undocumented alien in retaliation for union activity. Through his single act of terminating the employee, the employer appears to have both complied with the IRCA and violated the NLRA. This, however, is an inaccurate perception. The employer violated the IRCA when he discovered the unauthorized status of his employee and yet failed to terminate the employment. If this discovery was made (or intentionally not made)¹⁰⁰ prior to the time of hiring, then the IRCA was violated *upon* the alien's hiring. A future firing of such an alien does not expunge that violation. Likewise, if the discovery of an alien's unauthorized status is made while he is in one's employ, then the IRCA is violated when that employee is permitted to return to work on his next shift. A later termination of that employee does not cancel out the prior violation. Thus, an employer who commits an unfair labor practice against an undocumented alien after unlawful hiring or retention under the IRCA has violated *both* the NLRA and IRCA,¹⁰¹ and it is not inconsistent to hold him liable for both

99. *Sure-Tan*, 467 U.S. at 892-93.

100. See 8 U.S.C. § 1324a(a)(1) (1986).

101. It is possible that an employer could simultaneously learn of an employee's undocumented status and terminate that employee for a prohibited reason under the NLRA. In this case the employer would not violate the IRCA since he did not retain the employee whom he knew to be undocumented. The employer has violated the NLRA, however, since

violations.

CONCLUSION

The Board has established a policy of recognizing undocumented aliens as "employees" under the NLRA. This policy was affirmed by courts which have held that extending labor law protection to these aliens was in compliance with the provisions and purposes of both the NLRA and INA.

With the passage of the IRCA, a question arises as to whether the Board's policy is still valid. Prior to its passage, commentators argued that the adoption of employer sanctions would eliminate NLRA protection for undocumented aliens. This, however, is not the case.

The rationale used by the courts to affirm the Board's policy prior to the IRCA is still valid despite the illegalization of the employment of undocumented aliens. Congress did not change the meaning of the term "employee" in the NLRA. To the contrary, the legislative history of the IRCA indicates that Congress intended to *preserve* the Board's policy of protecting undocumented aliens as "employees" under the NLRA. Nor did Congress diminish the ability of the Board's policy to further the NLRA's purpose by imposing sanctions on those who employ undocumented aliens.

Although the Board's policy may appear to conflict with the terms of the IRCA, this belief is merely an illusion which does not stand up to analysis. An employer violates the two statutes through separate acts: the hiring of the alien with knowledge of undocumented status, and the firing of the alien with anti-union animus. The employer should be held liable for both of these violations.

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his motive was one which the Act prohibits. It would be up to the Board to decide the employer's actual motive, based on the particular facts of the case.

