

2002

# Reconciling the NLRA and IRCA: Can an Undocumented Worker Receive Back Pay? An Analysis of Hoffman Plastic Compound, Inc. v. NLRB

Barbara J. Fick

Notre Dame Law School, [barbara.j.fick.1@nd.edu](mailto:barbara.j.fick.1@nd.edu)

Follow this and additional works at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship](https://scholarship.law.nd.edu/law_faculty_scholarship)



Part of the [Courts Commons](#), [Labor and Employment Law Commons](#), and the [Workers' Compensation Law Commons](#)

---

## Recommended Citation

Barbara J. Fick, *Reconciling the NLRA and IRCA: Can an Undocumented Worker Receive Back Pay? An Analysis of Hoffman Plastic Compound, Inc. v. NLRB*, 2001-2002 Preview U.S. Sup. Ct. Cas. 199 (2001-2002).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/714](https://scholarship.law.nd.edu/law_faculty_scholarship/714)

This Article is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## Reconciling the NLRA and IRCA: Can an Undocumented Worker Receive Back Pay?

by Barbara J. Fick

PREVIEW of United States Supreme Court Cases, pages 199-202. © 2002 American Bar Association

Barbara J. Fick is an associate professor of law at Notre Dame Law School in Notre Dame, Ind.; fick.1@nd.edu or (219) 631-5864.

**Editor's Note:** The respondent's brief in this case was not available by PREVIEW's deadline

### ISSUE

Can an undocumented worker, fired in violation of the National Labor Relations Act (NLRA), receive a back-pay award to compensate for losses suffered as a result of the illegal discharge?

### FACTS

In May 1988, Hoffman Plastic Compound, Inc. (Hoffman), hired Jose Castro to work as a compounder in its California plant, which manufactures polyvinyl chloride pellets. Prior to employing Castro, Hoffman examined documents presented by Castro to verify his eligibility for employment within the United States. Unbeknownst to Hoffman, Castro's documents were fraudulent and he was not, in fact, authorized to work.

During December 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America began an orga-

nizing drive at Hoffman's plant. Castro became involved in the organizing campaign and distributed union authorization cards to other workers. Hoffman interrogated the employees concerning their union activities, and, having identified the union leaders, it laid off all the employees, including Castro, who had engaged in organizing activities.

Unfair labor practice charges were filed with the National Labor Relations Board (the NLRB or Board), alleging that the interrogation and layoffs violated §§ 8(a)(1) and (3) of the NLRA. After a hearing, the NLRB found that Hoffman had violated the statute and ordered the employer to reinstate the laid-off employees and make them whole for lost earnings.

Subsequently, a compliance hearing was held before an administrative law judge (ALJ) for purposes of computing the amount of back pay

(Continued on Page 200)

HOFFMAN PLASTIC COMPOUND,  
INC. V. NATIONAL LABOR  
RELATIONS BOARD  
DOCKET NO. 00-1595

ARGUMENT DATE:  
JANUARY 15, 2002  
FROM: THE DISTRICT  
OF COLUMBIA CIRCUIT

# Case at a Glance

The National Labor Relations Act prohibits firing employees because they have engaged in union organizing activities. The Immigration Reform and Control Act prohibits knowingly hiring aliens who are not authorized to work in the United States. This case presents an apparent conflict between the objectives of the NLRA (the prevention and remediation of unfair labor practices) and the IRCA (the denial of employment to undocumented aliens) based on an award of back pay to an undocumented worker who was fired because of his union organizing activities.





owed to the discriminatees, including Castro. At the hearing, Castro testified that he was a Mexican national who had used fraudulent documentation to obtain his employment. Accordingly, the ALJ recommended that Castro be denied both reinstatement and back pay.

Upon review of the ALJ's decision, the NLRB upheld the denial of reinstatement, finding that a reinstatement order would force the employer to violate the Immigration Reform and Control Act (IRCA) by knowingly hiring an undocumented alien. On the issue of back pay, however, the Board reversed the ALJ and applied the "after-acquired evidence" rule limiting the amount of back pay to the period from the date of the illegal layoff to the date when the employer learned of Castro's status as an undocumented worker. *Hoffman Plastic Compound, Inc.*, 326 NLRB 1060 (1998).

Hoffman filed a petition for review of the board's order with the U.S. Court of Appeals for the District of Columbia Circuit, contesting the award of back pay to Castro on the grounds that such awards were prohibited by the Supreme Court's ruling in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), and are contrary to the statutory policies expressed in the IRCA.

A divided panel of the D.C. Circuit upheld the board's decision. *Hoffman Plastic Compound, Inc. v. NLRB*, 208 F.3d 229 (D.C. Cir. 2000). Hoffman filed a petition for a rehearing *en banc*, which the court granted. Upon rehearing, the majority of the court again upheld the Board's decision, finding that the limited award of back pay to Castro appropriately effectuated the NLRA's policy of preventing and remedying unfair labor practices without

infringing upon the purposes behind IRCA. *Hoffman Plastic Compound, Inc. v. NLRB*, 237 F.3d 639 (D.C. Cir. 2001).

Hoffman filed a petition for writ of certiorari with the Supreme Court, which the Court granted. 150 L.Ed.2d 804, 122 S.Ct. 23 (2001).

### CASE ANALYSIS

The arguments in this case are primarily focused on the interpretation of a single sentence from a previous Supreme Court decision dealing with the application of the NLRA to undocumented workers. In *Sure-Tan*, the Court held that extending the protections of the NLRA to undocumented workers was consistent with the purposes of both the NLRA and the immigration law. As to the former, protecting undocumented workers prevents the creation of a subclass of employees whose substandard working conditions would undermine worker solidarity and impede collective bargaining. As to the latter statute, if undocumented workers were not protected, employers would have an incentive to hire illegals in order to undermine union organizing efforts.

The *Sure-Tan* Court also held that the employer's conduct—reporting its undocumented workers to the INS in retaliation for their support of the union—coerced these employees in the exercise of their right to join a union, in violation of the NLRA.

Lastly, the Court addressed the scope of the remedy for the violation. As a result of the employer's call to the INS, the undocumented workers were voluntarily deported to Mexico. The board issued a conventional remedial order providing for reinstatement and back pay, which was to be determined at a compliance hearing. On review of

the board's decision and order, the Seventh Circuit Court of Appeals held that the reinstatement order was subject to the condition of the employees' lawful re-entry into the U.S. Moreover, given the employees' current unavailability for work as a result of their deportation, it was possible that the deported discriminatees would receive no back pay, which the court felt would be inconsistent with the remedial purposes of the NLRA. Therefore, it ordered payment of six months' back pay, which it estimated would have been the period of time the employees would have escaped INS detection had the employer not illegally turned them in. The Supreme Court reversed the Seventh Circuit's award of back pay, finding it speculative and not "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." 467 U.S. at 901. In remanding the case to the board for a compliance proceeding to specifically calculate the amount of back pay owed, if any, the Court noted

Nonetheless, as the Court of Appeals recognized, the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States. In devising remedies for unfair labor practices, the Board is obliged to take into account another equally important Congressional objective—to wit, the objective of deterring unauthorized immigration that is embodied in the INA [Immigration and Nationality Act]. By conditioning the offers of reinstatement on the employees' legal re-entry, a potential conflict with the INA is thus avoided. *Similarly, in computing back pay, the employees must be deemed*



*"unavailable" for work (and the accrual of back pay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States.* 467 U.S. at 902-03 (emphasis added).

Hoffman argues that this italicized sentence from the *Sure-Tan* opinion plainly states that an award of back pay to undocumented workers for any period of time when they are not legally entitled to work is prohibited. Since the Supreme Court has already conclusively settled this issue, it was inappropriate for the board and the D.C. Circuit to award any back pay to Castro, who was not legally authorized to work in the United States during the back-pay period.

The board counters that this single sentence cannot be read in a vacuum but must be interpreted in light of the context of the *Sure-Tan* case. This sentence was part of the Court's remand order, giving direction to the board to take into account the specific factual circumstances of the case (i.e., the deportation status of the discriminatees) in the compliance proceedings. The remedial order needed to be crafted so as not to create an incentive for the discriminatees to illegally re-enter the U.S. in order to claim back pay. Thus, the Court emphasized that the back-pay amount must be tolled until the employees legally re-entered.

Moreover, the *Sure-Tan* Court rejected the employer's argument in that case that the immigration laws prohibit the award of any back pay to undocumented workers. The Court "generally approved of the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement and back pay," and remanded

for a compliance hearing to determine "the period of time these particular employees might have continued working before apprehension by the INS." 467 U.S. at 902. Therefore, the Court's decision in *Sure-Tan* is not dispositive of the question raised by this case. Indeed in a subsequent case (*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047-48(1984)) the Court had occasion to explicate its holding in *Sure-Tan*, observing that in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), the Court concluded that an employer can be guilty of an unfair labor practice in his dealings with an alien notwithstanding the alien's illegal presence in this country. Retrospective sanctions against the employer may accordingly be imposed by the National Labor Relations Board to further the public policy against unfair labor practices. But while he maintains the status of an illegal alien, the employee is plainly not entitled to the prospective relief—reinstatement and continued employment—that probably would be granted to other victims of similar unfair labor practices.

Hoffman responds that even if *Sure-Tan* does not prohibit back pay, neither the NLRA nor the IRCA provide for back pay in this case. Under the NLRA, an award of back pay must be tailored to the actual loss suffered by the employee. Since an undocumented worker is not legally entitled to employment, he has not suffered any legal harm when he is deprived of employment. The remedial purposes of the NLRA can be achieved through the imposition of the cease-and-desist order and the notice-posting requirement.

IRCA makes it illegal both to hire undocumented workers and to use

fraudulent documents to obtain employment. Thus, the immigration law clearly prevented Castro from obtaining employment, which logically means it prevents the award of back pay for such illegal employment.

The board, on the other hand, argues that the award of back pay is consistent with the NLRA and does not undermine the purposes of IRCA. The propriety of back-pay awards under the NLRA is governed by three principles. First, back pay restores the discriminatee to the position he would have been in absent the illegal employer conduct. Had Hoffman not violated the NLRA by illegally laying off Castro, he or she would have continued working and earning wages. In order to restore the *status quo ante*, this continuation in earning wages must be recognized.

Second, in determining the appropriate back-pay amount, the employee's wrongdoing becomes relevant. Thus, employment-related misconduct can result in an award of less than the full amount of back pay. The board accounted for Castro's misconduct in using fraudulent documents by applying the after-acquired evidence rule, a rule that received the Supreme Court's blessing in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). In *McKennon*, the Court held that the employer's discovery of employee misconduct, after the employer had discharged the employee allegedly in violation of the Age Discrimination in Employment Act, does not constitute a defense to an otherwise illegal discharge but can limit the amount of back pay. If an employer can prove that the employee's subsequently discovered misconduct would have caused the employer to fire the employee, the back-pay

(Continued on Page 202)



amount is limited to the period of time from the date of the illegal discharge to the date when the employer discovered the evidence of the employee's misconduct. In this case, the Board, consistent with *McKennon*, limited the amount of Castro's back pay to the period of time from his illegal layoff to the date when the employer discovered he had used fraudulent documents.

Third, in devising remedies, the board is required to take into account other congressional objectives as expressed in other federal laws. Thus, the board must accommodate the immigration laws when fashioning remedies under the NLRA. IRCA makes it unlawful for an employer to "knowingly" hire illegal aliens or to fail to comply with the employment-verification requirements. In this case, Hoffman checked Castro's documents (thereby complying with employment verification) and did not "know" Castro was illegal until he had testified at the compliance hearing. Therefore Hoffman could not violate IRCA until it knew Castro was illegal, which is the exact date used by the Board to cut off the award of back pay. Moreover, nothing in IRCA expressly prohibits the board from awarding back pay to illegal aliens. Indeed the IRCA's legislative history indicates that Congress did not intend to limit the remedial powers of the board. Thus, the board's limited award of back pay does not conflict with the purposes of IRCA.

Lastly, Hoffman argues that IRCA makes it a crime for an individual to obtain employment using fraudulent documents. Any award of back pay to Castro, in light of his criminal activity in gaining employment, is clearly contrary to the express provisions of IRCA.

The board, in response, cites to the Supreme Court's decision in *ABF*

*Freight System v. NLRB*, 510 U.S. 317 (1994), in which the Court rejected the employer's argument that the employee's perjury should preclude an award of back pay. The Court emphasized that the board has the primary responsibility and broad discretion for devising remedies to effectuate the policies of the NLRA. Thus, balancing Castro's misconduct against Hoffman's is the responsibility of the board, which it carried out by limiting the back-pay award pursuant to the after-acquired evidence rule. Moreover, what IRCA criminalizes is the use of fraudulent documents; Castro could be prosecuted for fraud, but not for the fact that he was employed.

#### SIGNIFICANCE

Undocumented aliens are easy targets for employer exploitation in wages, hours, and working conditions. They are understandably reluctant to complain to government agencies charged with enforcing workplace standards. Although *Sure-Tan* made clear that these workers have the right under the NLRA to join unions, employers can easily undermine that right if they can fire those workers with monetary impunity. Moreover, the American labor movement has indicated that one of its organizing priorities is among low-wage, recent immigrant workers. Given recent events, even lawfully admitted aliens are somewhat wary of dealing with government agencies, and threats to call the INS can create anxiety even for legal residents. Thus, employers faced with union-organizing drives among their immigrant workforce may decide, based on a cost-benefit analysis, that it pays to violate the NLRA when one can do so without incurring monetary liability.

On the other hand, one of the strongest incentives for illegal entry into the U.S. is economic—the hope

of obtaining employment at a higher wage level than is available in one's native land. IRCA was designed to address that incentive by placing on employers the burden to verify eligibility and by criminalizing an employer's knowing employment of illegal aliens. Awarding back pay to an alien who is not legally authorized to work arguably undercuts IRCA's attempt to remove the economic incentives for illegal immigration, thus encouraging illegal immigration.

#### ATTORNEYS FOR THE PARTIES

For Hoffman Plastic Compound, Inc. (Maurice Baskin (202) 962-4800)

For the National Labor Relations Board (Theodore B. Olson, Solicitor General, U.S. Department of Justice (202) 514-2217)

#### AMICUS BRIEFS

In Support of Hoffman Plastic Compound, Inc.

Equal Employment Advisory Council and I.P.A., Inc. (Ann Elizabeth Reesman (202) 789-8600)

In Support of the National Labor Relations Board

American Civil Liberties Union et al. (Lucas Guttentag (212) 549-2621)