

A.P.R.A. Fuel Oil Buyers Group, Inc., Prudential Transportation, Inc., and Amer-National Heating Service, Inc. and Local 553, International Brotherhood of Teamsters, AFL-CIO and Jesus Campos and Alberto Guzman and Damaris Gomez. Cases 29-CA-15517, 29-CA-15589, 29-CA-15446, 29-CA-15459, 29-CA-15571, 29-CA-15518, 29-CA-15467, 29-CA-15482

December 21, 1995

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS
BROWNING, COHEN, AND TRUESDALE

On November 12, 1992, the Board issued a Decision, Order, and Direction¹ adopting the judge's findings that the Respondent had committed numerous violations of Section 8(a)(1) of the National Labor Relations Act² and had violated Section 8(a)(3) of the Act by discharging six employees, including Victor Benavides and Alberto Guzman, based on their union activities. The Board ordered the Respondent to offer to reinstate with backpay the unlawfully discharged employees, including Benavides and Guzman, rejecting the Respondent's argument that these two discriminatees are aliens lacking documents enabling them to obtain employment lawfully in the United States and are therefore ineligible for reinstatement, in accordance with the Immigration Reform and Control Act of 1986 (IRCA).³ The Board majority, noting that the case involved a 10(j) injunction and a *Gissel* bargaining order, decided to "leave to another case any reconsideration of the Board's law" respecting the effect of Benavides' and Guzman's alleged status as undocumented workers on the extent of the make whole remedies available to them.⁴ Subsequently, by Order dated

¹ 309 NLRB 480.

² As discussed below, the Board found that the Respondent had, inter alia, interrogated employees, threatened them with discharge, denied them raises and vacation pay, threatened them with plant closure, conveyed to them the impression that choosing union representation would be futile, and promised employees benefits if they renounced their support for the Union. The Board also ordered that challenged ballots be opened, directed that the Union be certified if a new tally showed that a majority of votes had been cast for the Union and that the election be set aside if the Union lost the tally, and issued a *Gissel* bargaining order based on the Respondent's unfair labor practices. On December 9, 1992, a certification of representative issued. On September 28, 1993, the Board found that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to bargain with the certified Union. *A.P.R.A. Fuel Oil*, 312 NLRB 471 (1993).

³ 8 U.S.C. Sec. 1324a et seq. As discussed more fully below, IRCA prohibits an employer from hiring or continuing to employ an alien knowing that he/she is not authorized to work in this country.

⁴ 309 NLRB 480 fn. 4. The majority noted that under Board precedent, the Respondent's arguments that Benavides and Guzman were not eligible for backpay and reinstatement were without merit. Member Oviatt would have denied reinstatement. *Id.*

July 28, 1993, the Board sua sponte severed for reconsideration the portion of its original Order providing for reinstatement offers and backpay for Benavides and Guzman. The Board solicited briefs from all parties concerning the propriety of the Board's Order concerning these remedies for Benavides and Guzman. The General Counsel and the Respondent filed briefs and the International Ladies' Garment Workers Union (ILGWU) filed an amicus brief.⁵ In an unpublished Order dated May 20, 1994, the United States Court of Appeals for the Second Circuit enforced the remainder of the Board's original November 12, 1992 Order. In addition, the court enforced the Board's September 28, 1992 Order in the refusal-to-bargain proceeding. *NLRB v. A.P.R.A. Fuel Oil*, No. 93-4263 (2d Cir. 1994).

After carefully considering the briefs and reviewing the record, we find that IRCA and the NLRA can and must be read in harmony as complementary elements of a legislative scheme explicitly intended, in both cases, to protect the rights of employees in the American workplace. We reject the Respondent's reading of IRCA as requiring the Board to deny its traditional make-whole remedies to unlawfully discharged employees because they have not provided documents necessary for legal employment in the United States. On reconsideration, for the reasons below, we modify our earlier remedy in this proceeding. We shall order the Respondent to offer reinstatement to Benavides and Guzman; however, we condition the Respondent's obligation to reinstate these individuals on the individuals' production, within a reasonable time, of documents enabling the Respondent to meet its obligation under IRCA to verify their eligibility for employment in the United States. Backpay shall be tolled as of the date the discriminatees are reinstated or when, after a reasonable period of time, they are unable to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States.

⁵ The Respondent also filed a motion to dismiss this proceeding based on alleged agency misconduct involving the General Counsel's submission of the judge's decision and certain pages of the transcript to the Immigration and Naturalization Service (INS) for consideration of whether the Respondent had violated IRCA by hiring undocumented aliens. The Respondent contends that the General Counsel's action demonstrates that the Board is not impartial in this proceeding. In opposing the motion, the General Counsel asserts that, when the facts of a case indicate that another Federal statute may have been violated, it is permissible to cooperate with the Federal agency that investigates such violations. We deny the Respondent's motion. Although the Board generally has no involvement in the enforcement of statutes other than the NLRA, we find that referral of possible violations to other agencies is a matter within the discretion of the General Counsel. More importantly, we find that the action of the General Counsel, who is before the Board as a party in this proceeding and whose role is thus clearly distinguishable from that of the Board, has no bearing on the Board's ability to render an impartial decision concerning the matters presented in this case.

I. FACTS

The relevant facts are not in dispute. The Respondent hired Benavides and Guzman after each of them explicitly informed it that he was not eligible for lawful employment in the United States based on immigration status.⁶ Before Benavides began working for the Respondent as a boiler mechanic on August 15, 1990, Vincent Lator (referred to in the earlier decision and herein as Vincent), president of Respondent Prudential Transportation, personally interviewed him.⁷ Benavides informed Vincent that his real name was Jose Cuidad and that he had entered the country on a 6-month visitor's visa and lacked the necessary "green card" to work legally in the United States. Vincent told Benavides that to work for the Respondent, he must have a "legal" name so that the Respondent could put him on its books. Benavides told Vincent that the real Victor Benavides was leaving the country and had given Benavides his social security card to use to obtain employment.

Guzman, who had worked for the Respondent previously from mid-1989 until January 1990, was rehired in June 1990 as a truck mechanic. When Vincent first interviewed him, Guzman told Vincent that his real name was Jorge Bianey Diaz and that he was in the United States illegally and had no working papers. Vincent directed him to get a social security card, and he obtained one in the name of Alberto Guzman.

The Respondent discharged Guzman on January 14, 1991, and Benavides on February 3, 1991. In its earlier decision, the Board found that neither Guzman nor Benavides would have been discharged but for the ongoing union activities of the Respondent's employees and that their discharges thus violated Section 8(a)(3) of the Act. Both discharges occurred about 1 month after the Respondent learned of its employees' union activities and in an atmosphere of flagrant and pervasive unfair labor practices, including threats of plant closure, the unlawful discharges of four more employees and threats to fire still others, coercive interrogations, promises of benefits if employees voted against the Union, and coercion in obtaining affidavits revoking authorization cards. The Board found that on January 8, 1991, Vincent interrogated Benavides and Guzman concerning their union activities and told them to sign already prepared affidavits falsely attesting, *inter alia*, that they had never signed authorization cards, or "look for a job elsewhere." The Respondent directed further unlawful and coercive conduct toward

Guzman, also within days of his discharge, including interrogations by Vincent and his brother Robert, the Respondent's general manager, who threatened to close the business down because of the union activity and told Guzman that he "could go back to his country." As noted above, to remedy these unlawful discharges, the Board initially ordered the Respondent to offer the customary remedies of immediate reinstatement with backpay to Benavides and Guzman, along with the other discriminatees.

II. POSITIONS OF THE PARTIES

In his initial brief following the Board's decision to reconsider the remedies for Benavides and Guzman, the General Counsel contended that, at a minimum, the Board should order the Respondent to offer Guzman and Benavides reinstatement, conditioned on the establishment of their eligibility to work in the United States under IRCA, and to provide backpay from the date of their unlawful discharges until the date they are offered such conditional reinstatement. The General Counsel asserted that these remedies comport with prior Board cases involving discriminatees no longer qualified for their jobs.⁸ The General Counsel argued that the Board should also date the backpay period from the discharge until the offer of conditional reinstatement, noting that the Board has awarded backpay even when a discriminatee had been employed in violation of state or local law.⁹

In a supplemental brief, the General Counsel reiterates his position that the Board should order the Respondent to offer the discriminatees reinstatement and further contends that the offer should be kept open for a reasonable period to provide the employees an opportunity to complete a valid INS Form I-9, Employment Eligibility Verification, or make other arrangements with the INS to begin work. In the event that the discriminatees are unable to come forward with documents the inspection of which would satisfy the Respondent's duties under IRCA, the General Counsel urges that the Board order the Respondent to hire an applicant named by the Union, analogizing this remedy to the affirmative race-conscious relief ordered in cases of patterns of discrimination found under Title VII of the Civil Rights Act of 1964.¹⁰ Without such relief, the General Counsel argues, the Respondent's violations of Section 8(a)(3) would be essentially unremedied and thereby accomplish for the Respondent its unlawful goal of ridding itself of unwanted union supporters and

⁶ Although the Respondent asserts in its brief that an INS investigation revealed no violation of IRCA, it has provided no evidence to support that assertion. We rely on the facts found by the judge and adopted by the Board in its earlier decision.

⁷ In its earlier decision in this case, the Board adopted the judge's finding that the three Respondents constitute a single employer within the meaning of the Act.

⁸ The General Counsel cites *De Jana Industries*, 305 NLRB 845 (1991) (reinstatement of employee to truck driver position conditional on employee's establishing that he has a valid driver's license, when license lost during period of unemployment).

⁹ See, e.g., *New Foodland*, 205 NLRB 418 (1973) (discriminatee awarded backpay for entire interim period, including portion when she was underage for employment in liquor store).

¹⁰ See *Sheet Metal Workers v. EEOC*, 478 U.S. 420 (1986).

diluting union support in the bargaining unit. Further, Benavides' and Guzman's rights as employees under the Act would not be vindicated. In addition, the General Counsel asserts that the discriminatees are entitled to backpay from the date of discharge until the earliest of the following: their lawful reinstatement; their failure within a reasonable time to seek approval from the INS to work; the INS's rejection of their request for permission to work; or the Union's failure, within 14 days of a request by the Respondent, to refer an applicant for hire. If the Union chooses to refer an applicant, the General Counsel contends that backpay should continue until the applicant is hired.

The Respondent argues that IRCA renders unauthorized aliens legally ineligible to be employed in the United States and that the Board therefore should not treat them as employees within the coverage of the Act. Thus, according to the Respondent, IRCA preempts the Board's authority to order reinstatement or backpay for unauthorized aliens discharged from employment, even as a remedy for employer unfair labor practices. Moreover, the Respondent contends that the equities of the present case warrant denial of relief to Benavides and Guzman, because, it alleges, they entered the United States illegally and obtained employment using false social security cards. The Respondent opposes the General Counsel's position that, if Benavides and Guzman are not eligible for lawful reinstatement in compliance with IRCA, the Board should order the Respondent to hire an applicant referred by the Union, arguing that this remedy is a penalty beyond the authority of the Board.

In its amicus brief, the ILGWU agrees with the General Counsel that the Board should order reinstatement and backpay for Benavides and Guzman. The ILGWU urges the Board, as a general policy, to order reinstatement when appropriate without conditioning it on the discriminatee's proof of lawful status, but to ask, as it does in other types of cases, whether the employee is available in fact for work rather than legally eligible for employment. The employer would be free at any time to raise the defense of ineligibility based on immigration status. If the employer is successful and the employee cannot be lawfully reinstated, the ILGWU contends that the Board should fashion other remedies, such as backpay until the employee obtains work authorization and is lawfully reinstated or until the employer establishes that the employee would have been terminated for nondiscriminatory reasons. When the discharge occurs in the environment of union organizing activities, the ILGWU asserts that the Board should order extraordinary relief, which may include such measures as a bargaining order, union access, or reimbursement of union organizing expenses. In addition, the ILGWU maintains that the Board should award backpay from the date of discharge until rein-

statement or until the Respondent provides a successful defense to reinstatement. It urges the Board not to toll backpay if a discriminatee has not been able to produce adequate documentation of legal status within a reasonable time, because employers may view a limited backpay award as a quite reasonable cost of union avoidance. Thus, according to the ILGWU, only a continuing backpay obligation would deter employers from repeatedly violating the Act with respect to undocumented employees.

III. DISCUSSION

A. *The Board's Remedial Authority*

Congress has vested the Board with broad authority to remedy unfair labor practices. Section 10(c) of the Act directs the Board, upon finding that an unfair labor practice has been committed, to 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 back pay, as will effectuate the policies of [the] Act." The Supreme Court has consistently recognized that the Act addresses the expansive public policy goals of maintaining and promoting industrial peace, and leaves "the adaptation of means to end to the empiric process of administration." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In *Phelps Dodge*, the Court further states that "[t]he exercise of the process was committed to the Board . . . [b]ecause the relation of *remedy to policy* is peculiarly a matter for administrative competence." *Id.* (Emphasis added.)¹¹ Indeed, more recently, the Court has reaffirmed the Board's discretion in remedial matters in *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), when it found that the Seventh Circuit Court of Appeals had exceeded the limitations of its review of a Board remedy by sua sponte modifying it, rather than remanding the case to the Board.¹²

In exercising our broad authority to remedy violations of the Act, however, we are fully cognizant of our obligation to consider with care Congressional mandates in other areas of public policy. As the Court pointed out in *Southern Steamship v. NLRB*, 316 U.S. 31 (1942), the Board may not "apply the policies of its statute so single-mindedly as to ignore other equally important Congressional objectives."¹³

¹¹ See also *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953).

¹² As discussed in detail below, *Sure-Tan*, like the present proceeding, involved the treatment under the Act of undocumented aliens.

¹³ *Local 1976, Carpenters v. NLRB (Sand Door & Plywood Co.)*, 357 U.S. 93, 111 (1958). *Sand Door* itself, by implication, admonishes the Board not to "weaken the effectiveness of a statutory prohibition," which it viewed as "an abuse of discretion in giving a remedy." *Id.* But the Court in *Sand Door* also notes that it contains no "suggestion that the Board should abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different stat-

In our view, this case raises the issue whether the language and legislative intent of IRCA conflict with or override our statutory authority to remedy unfair labor practices and to exercise our judicially recognized discretion in determining what form such remedies should take. With respect to the remedial issues raised in the instant case, we find that Congress has enacted both the NLRA and the statutes regulating immigration, specifically IRCA, to further virtually identical policy objectives with respect to the American workplace. Furthermore, we find that Congress has expressly indicated that the policies underlying these statutes reinforce each other. Thus, for the reasons below, we believe that we can best achieve this mutuality of purpose and effect by vigorously enforcing the NLRA, including providing traditional Board remedies, with respect to all employees, to the extent that such enforcement does not require or encourage unlawful conduct by either employers or individuals.

B. *Sure-Tan*

In *Sure-Tan*, the Supreme Court recognized the intertwining of labor law protections and immigration policy under IRCA's predecessor, the Immigration and Nationality Act (INA). The INA prohibited unlawful entry into the United States but, unlike IRCA, did not specifically prohibit employers from hiring persons who had entered the country illegally. In *Sure-Tan*, which arose under the INA, on the day after a union victory at its facility, the employer requested an INS investigation of its employees' immigration status, which resulted in the arrest and placement in custody of five employees for living and working illegally in the United States. Rather than face deportation, the five employees left the United States that day. The Board found that the employer had violated Section 8(a)(3) and (1) by calling in the INS because the employees had voted in a union.¹⁴ To remedy the violations, the Board ordered the employer to reinstate the employees with backpay, leaving to compliance the question whether they were in fact available for work during the backpay period.

The Court of Appeals for the Seventh Circuit modified the Board's remedy in several respects.¹⁵ It provided that the employees may be reinstated only if

ute.' Id. at 111. We believe that our result here satisfies the obligation to view Federal policy as a broad spectrum, reflecting many policies and purposes, rather than as a patchwork of unrelated and, when viewed superficially, conflicting elements. The latter approach, unfortunately, can result in the frustration of congressional purposes if various statutory schemes are permitted to cancel each other out. In fashioning our remedy with respect to Guzman and Benavides, we have consciously sought not only to serve the congressional objectives of our own statute, but to strengthen the underpinnings of Congress' policy choices in enacting IRCA.

¹⁴ *Sure-Tan, Inc.*, 234 NLRB 1187 (1978).

¹⁵ *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982).

they were "legally present and legally free to be employed" in the United States.¹⁶ The Seventh Circuit also directed that the reinstatement offers remain open for 4 years, a period it deemed a reasonable time for the employees to arrange for legal reentry, and that the employees be considered unavailable for work for the purposes of computing backpay when they were not "lawfully entitled to be present and employed in the United States."¹⁷ Recognizing that the latter conditions might serve to deny backpay to the discriminatees, the court ordered that the employer pay a minimum of 6 months' backpay, because, in the court's view, the employees could reasonably have remained employed for such a period without apprehension by the INS had the employer not caused them to lose their jobs.¹⁸

In reviewing the Seventh Circuit's decision, the Supreme Court examined the complex and close connection between the flow of illegal immigrants into the United States and the terms and conditions of employment in this country. The Court cited its decision in *De Canas v. Bica*,¹⁹ in which it had found that "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."²⁰ The *Sure-Tan* Court further found:

If undocumented alien employees were excluded from participation in union activities and from protections against employer intimidation, there would be created a subclass 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.²¹

The Court held, in agreement with the Board and the Seventh Circuit, that the Act's policies "fully support" the view that undocumented aliens are employees under Section 2(3) of the Act, and that extending to them the Act's protections furthers the purposes of the statute.

The Court also determined that applying the NLRA to undocumented aliens presented no conflict with the INA. Initially, the Court noted that the INA prohibited neither the hiring of undocumented aliens nor the acceptance of employment by the aliens. Moreover, the Court found that a key purpose of immigration restrictions is to preserve jobs for American workers. Coverage of undocumented workers by the NLRA, the Court reasoned, helps to ensure reasonable working

¹⁶ Id. at 606.

¹⁷ Id.

¹⁸ Id.

¹⁹ 424 U.S. 351, 356-357 (1976).

²⁰ *Sure-Tan*, 467 U.S. at 892.

²¹ Id.

conditions by decreasing competition from aliens willing to accept substandard wages and employment conditions. It also eliminates the distinct economic advantage and thus the incentive to employers of hiring illegal aliens in preference to American citizens or alien employees working lawfully. A reduction in the availability of jobs to undocumented aliens, the Court found, would in turn discourage many aliens from entering the United States illegally.

The Court further agreed with the Board and the Seventh Circuit that the employer there had violated the Act by requesting the INS investigation in retaliation for the employees' union activities. The Court reversed the court of appeals, however, and remanded the case to the Board with respect to the remedies, noted above, as to which the court of appeals had reversed the Board. The Court held that the Seventh Circuit had exceeded its limited judicial review under the Act and had ordered remedies outside the Board's authority by imposing a minimum backpay period. The Court approved instead the Board's approach of determining at compliance the employer's exact backpay liability.

In view of the employees' departure from the United States and in order to avoid a conflict with the INA's prohibition on illegal entry, the Court agreed with the appeals court that reinstatement must be conditioned on legal reentry, and that the employees must be considered unavailable for backpay purposes during periods when they were not "lawfully entitled to be present and employed in the United States."²² Significantly, the Court did not find that the employees' original unlawful presence in the United States itself foreclosed them from receiving backpay. In fact, in reversing the award of 6-month minimum backpay, the Court criticized the approach, not because of the employees' immigration status, but because of the lack of evidence that the employer would have continued to employ the illegal aliens for such a period before the INS apprehended and deported them.²³

In a case decided 10 days after *Sure-Tan*, the Supreme Court characterized its holding there as permitting the imposition of retrospective sanctions under the Act against an employer that commits an unfair labor practice with respect to an undocumented alien, but not entitling such aliens to prospective relief, "reinstatement and continued employment," while they remain undocumented.²⁴

²²Id. at 903. The Court found that even if these conditions deprived the employees of reinstatement and backpay, the violations would still be remedied by the cease-and-desist order, which would subject the employer to contempt sanctions for further violations.

²³Id. at 902 fn. 11. Similarly, the Court remanded for Board consideration the determination that the reinstatement offers must remain open for 4 years. Id. at 905.

²⁴*INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 fn. 4 (1984) (emphasis added).

Then 2 years after the Supreme Court's decision in *Sure-Tan*, the Ninth Circuit, in *Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro)*, 795 F.2d 705 (9th Cir. 1986), found that the Supreme Court had not resolved the backpay eligibility of undocumented aliens who, unlike the illegal entrants in *Sure-Tan*, remained in the United States. In *Felbro*, the employer had reinstated the undocumented discriminatees, leaving for determination only their entitlement to backpay. The Ninth Circuit found that *Sure-Tan* addressed—and rejected on the separate grounds of speculativeness—only the Seventh Circuit's 6-month minimum backpay period for aliens who had left the country. The Ninth Circuit read *Sure-Tan* as implying that if the employees had been present in the United States, backpay would have been available to them, because *Sure-Tan* suggested that a backpay period may be based on the time that the employees might have worked before being apprehended by the INS.²⁵ Moreover, the Ninth Circuit pointed out that the Supreme Court did not overrule a line of precedent conditioning backpay on an employee's availability in fact rather than on his legal status. The court cited its own decision in *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979), in which six undocumented aliens were reinstated with backpay, and numerous Board decisions in which backpay was also ordered despite a legal disability, such as the lack of a necessary license or failure to meet the legal age requirements, that rendered the discriminatorily discharged employee unable to work legally.²⁶

In *Felbro*, the Ninth Circuit concluded further that awarding backpay to undocumented aliens who remain in this country helps to achieve the purposes of the Act by deterring unfair labor practices and removing the economic advantages gained by employers that violate the Act. Conversely, the court reasoned, conditioning backpay for undocumented workers on the demonstration of lawful immigration status would, for all practical purposes, effectively deny backpay. The court followed the rationale in *Sure-Tan* in reasoning that such a policy would also penalize legal workers, because

²⁵*Felbro*, 795 F.2d at 717. The Ninth Circuit relied on the Supreme Court's statements that Board estimates of backpay had been upheld in cases when the Board had applied "a reasonable formula for determining the probable length of employment and compensation due and permitted the employer to come forward with evidence mitigating liability." *Sure-Tan*, 467 U.S. at 902–903 fn. 11. The Court found that, in contrast, the Seventh Circuit had imposed a minimum 6-month backpay period "without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS." Id.

²⁶Among the decisions cited by the court are *Justrite Mfg. Co.*, 238 NLRB 57, 65–68 (1978) (underage discriminatee); *Local 57, International Union of Operating Engineers*, 108 NLRB 1225, 1227–1228 (1954) (engineer without valid state license); and *Robinson Freight Lines*, 129 NLRB 1040, 1042 (1960) (truck driver without valid driver's license).

employers would find it financially advantageous to hire undocumented workers who could be denied normal labor safeguards. Moreover, whereas an award of backpay in *Sure-Tan* would clearly have encouraged the discriminatees to reenter the country, presumably in violation of the INA, backpay in cases when the employees were already present in the United States would not promote illegal action on the part of the discriminatees. Instead, granting backpay to discriminatees regardless of their immigration status would equalize an employer's liability for its unlawful conduct toward undocumented workers with that toward lawfully employed workers unquestionably entitled to the full range of the Board's remedies.²⁷ Finally, the Ninth Circuit noted that requiring employees to demonstrate their legal status in order to qualify for backpay would put the Board in the position of resolving this issue through compliance, a task clearly outside the Board's special expertise.

The Ninth Circuit's approach was criticized by the Seventh Circuit in *Del Rey Tortilleria v. NLRB*, 976 F.2d 1115 (1992). Like *Felbro*, *Del Rey* involved only the backpay remedy available to undocumented discriminatees who remained in the United States. The Board had adopted the remedy recommended by the administrative law judge, including backpay from the date of discharge to the employees' reinstatement, unless the employer could prove their illegal presence in this country by means of a final INS deportation order. In denying enforcement of the Board's Order, the court majority found that, because they failed to meet the literal language of *Sure-Tan* that employees must be "lawfully entitled to be present and employed in the United States," the discriminatees had not been harmed in a legal sense and thus had no entitlement to backpay. The *Del Rey* court held, therefore, that even undocumented workers physically available for work in the United States are ineligible for backpay.²⁸ The court further held that it was the employee's burden to demonstrate legal immigrant status in order to receive backpay, rather than the employer's duty to produce a deportation order to avoid backpay liability.

In a strong dissent, Judge Cudahy found that the phrase "lawfully entitled to be present and employed in the United States" was intended to address the specific circumstances in *Sure-Tan*, which he distinguished from those in *Del Rey*. Judge Cudahy noted that he spoke with authority on this point, because he

had crafted the phrase in writing for the Seventh Circuit majority in *Sure-Tan*. In Judge Cudahy's view, once an individual had crossed the border into the United States, his acceptance of employment or an employer's providing employment to him did not constitute a further legal offense. Pointing out that the Supreme Court rejected the backpay remedy in *Sure-Tan* on the grounds that the 6-month minimum period was speculative rather than prohibited, Judge Cudahy distinguished between "having to break the law to reach the workplace and lacking a formal entitlement to work."²⁹ He also found that the backpay remedy in cases such as *Del Rey*, like other cases involving legal obstacles to employment, is strictly remedial in that it gives back to the discriminatees what they would have earned in the absence of the unfair labor practice. Moreover, in compliance with the framework set out by the Supreme Court in *Lopez-Mendoza*, he characterized backpay, as opposed to reinstatement, as a standard retrospective remedy.

C. IRCA: Legislative Purpose and Applicable Provisions

In undertaking to reform Federal immigration law by enacting IRCA in 1986, Congress clearly recognized, as had the Supreme Court in *Sure-Tan*, the unseverable connection between the flow of illegal immigrants, the availability of jobs for them in the United States, and the working conditions of American and alien employees. IRCA for the first time established sanctions for employer conduct, prohibiting employers from knowingly hiring or continuing to employ undocumented aliens.³⁰ To meet its IRCA obligations, an employer must examine the documents prescribed by the statute and required to be presented by each newly hired employee to verify his/her identity and eligibility to work, and must attest that it has examined the documents and that they appear to be genuine and to relate to that employee.³¹

IRCA's legislative history demonstrates that Congress decided to require employers to close the workplace door to illegal immigrants because "employment is the magnet that attracts aliens here illegally."³² Through imposing civil and, in extraordinary cases, criminal penalties on employers that knowingly employ undocumented workers, Congress intended to discourage employers from hiring undocumented aliens and thereby to gain control of the flow of illegal workers into this country.³³ Both houses of Congress explicitly noted that the hiring of undocumented workers

²⁷ The Second Circuit agreed with this view of *Sure-Tan* in a pre-IRCA case involving Title VII of the Civil Rights Act of 1964. *Rios v. Enterprise Association Steamfitters Local 638*, 860 F.2d 1168 (1988) (undocumented aliens who remained in the United States held eligible for backpay).

²⁸ The court further stated in dicta that, in cases arising after the enactment of IRCA, the statute's prohibition against hiring undocumented aliens would preclude backpay awards when such employees are discriminatorily discharged.

²⁹ 976 F.2d at 1124 (Cudahy, J., dissenting).

³⁰ 8 U.S.C. Sec. 1324a(a).

³¹ 8 U.S.C. Sec. 1324a(b).

³² H.R. Rep. No. 99-682 Part 1 at 46 (1986)(H.R. Rep.). See also S. Rep. No. 99-132 at 1 (1986) (S. Rep.).

³³ H.R. Rep. at 56.

adversely affects American employees because alien workers, out of desperation, will work in substandard conditions and for starvation wages. Particularly affected, Congress found, are low-income and low-skilled Americans, including many members of minority groups, who compete most directly with undocumented aliens for jobs.³⁴

Consistent with its objective to deter the employment of undocumented aliens in preference to American and other documented workers, Congress expressly approved the view of the Supreme Court in *Sure-Tan* that undocumented workers are entitled to established labor protections, and that any other policy would put such workers even more at the mercy of their employers and thus increase the unfair economic advantages gained from hiring them. The House 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 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 7 and 8 of that Act. As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) 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." 467 U.S. at 893.³⁵

This unequivocal statement indicates clearly that Congress believed that providing the aliens, once they are hired, the same protections, most prominently those provided under the National Labor Relations Act, afforded to American employees was the most effective means of eliminating the economic incentives for employers to hire undocumented aliens. We note especially that the House Report explicitly disclaims any limitation on the power to remedy employers' avoidance of workplace protections.

D. Conclusions

The legislative history of IRCA provides the Board with explicit guidance in our endeavor to fulfill our

own mandate under the NLRA without impeding congressional intent as expressed in other statutes. Congress clearly directed the Board to persist in applying the protections and remedies of the Act to employees, including those hired despite their lack of authorization to enter the United States or to work here. As the House Report emphasized, "as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country or violate status once admitted as a nonimmigrant in order to obtain employment will continue."³⁶

As recognized by Congress and the Supreme Court in *Sure-Tan*, the appeal of undocumented workers to employers is that aliens will often accept wages and conditions of employment considered unconscionable in this country. A ready supply of individuals willing to work for substandard wages in unsafe workplaces, with unregulated hours and no rights of redress, enables the unscrupulous employers that depend on illegal aliens to turn away Americans and legally working alien applicants who hesitate to accept the same conditions. In addition, the continuous threat of replacement with powerless and desperate undocumented workers would certainly chill the American and authorized alien workers' exercise of their Section 7 rights. We recognize, as have both Congress and the Supreme Court, that this chain of events wreaks havoc with Federal policies concerning both labor and immigration. Granting unlawful aliens full redress for violations of their Section 7 rights, then, should act as a deterrent to such unprincipled and opportunistic employers, and level the competitive playing field between them and the vast majority of employers in the United States that recognize and respect the rights of their employees and that carefully follow the procedures IRCA requires.

Moreover, if full remedies are not granted, the illegitimate economic advantage to unscrupulous employers that knowingly employ undocumented workers has an even deeper corrosive effect on congressional policies respecting the workplace; undocumented aliens are extremely reluctant to complain to the employer or to any of the agencies charged with enforcing workplace standards for fear that they will lose their jobs or risk detection and ultimately deportation by the INS. Thus, workplace abuses can occur in secret and with relative impunity.

This case and other cases discussed above demonstrate the harsh realities on which workers' fears are based. Here, as part of an unprincipled effort to stave off the union representation its employees sought, the Respondent aimed several serious unfair labor practices at Benavides and Guzman, including interrogations and a threat that the Respondent would shut down and that Guzman could go back to his country,

³⁴ S. Rep. at 5; H.R. Rep. at 47.

³⁵ H.R. Rep. at 58.

³⁶ H.R. Rep. at 56.

directed at pressuring Benavides and Guzman to withdraw their support for the Union. Finally, the Respondent exercised the ultimate weapon against them: it discharged them when they withstood its coercion. Similarly, in *Sure-Tan*, the employer requested an investigation of its employees by the INS 1 day after the union won the election.³⁷

Under IRCA, some employers may hesitate to risk liability by raising the unlawful immigration status of their discharged employees in retaliation for protected activities. Other employers, however, may consider the penalties of IRCA a reasonable expense more than offset by the savings of employing undocumented workers or the perceived benefits of union avoidance. Preserving employees' rights to organize for collective bargaining, on the other hand, induces employers to maintain reasonable standards and conditions in the workplace.

Despite the obvious congressional intent that IRCA and the NLRA operate in tandem, the practical implementation of this objective requires that the Board make policy choices. After considering the many complexities of the policies underlying both statutes, we conclude that the most effective way for the Board to accommodate—and indeed to further—the immigration policies IRCA embodies is, to the extent possible, to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees. To do otherwise would increase the incentives for some unscrupulous employers to play the provisions of the NLRA and IRCA against each other to defeat the fundamental objectives of each, while profiting from their own wrongdoing with relative impunity. Thus, these employers would be free to flout their obligations under the Act, secure in the knowledge that the Board would be powerless fully to remedy their violations.³⁸

For this reason, we shall order the Respondent to offer reinstatement to Benavides and Guzman. We shall, however, condition the Respondent's obligation to reinstate them on their satisfaction of the normal verification of eligibility requirements prescribed by IRCA.³⁹ This approach is consistent with the Supreme

³⁷ See also *Apollo Tire*, supra (undocumented aliens laid off for complaining about the nonpayment of overtime).

³⁸ It is not difficult to envision a scenario in which, whenever employees exhibit interest in a union, the employer discharges them, secure in the knowledge that the Board can generally do no more than require it to cease and desist and post a notice. Such an outcome would be especially unfortunate in this case, in which the Respondent colluded with the aliens in facilitating their unlawful employment.

³⁹ We are imposing this condition because the Respondent knew at the time of their hire that Benavides and Guzman were ineligible for employment. In the ordinary case, when the IRCA requirements have been met, there may be no need for this additional condition. Employers, of course, will be entitled to raise questions with respect to the continued eligibility of individuals for employment. These

Court's admonition in *Sure-Tan* that the Board may not order remedies that entail conduct in violation of immigration statutes.

We note further that the present case is distinguishable from *Sure-Tan* in several important respects that render a different outcome appropriate. We agree with the view of the Ninth Circuit in *Felbro* that the *Sure-Tan* Court was particularly concerned that the employees in that case, having voluntarily left the United States, were unavailable for reinstatement and their reentry into the country would constitute a violation of the INA. The Court was not required to deal with the implications of reestablishing the employment relationship between *Sure-Tan* and the discriminatees, not only because the employees were physically unavailable, but also because the INA did not prohibit the employment of undocumented aliens. As noted by the Supreme Court in *De Canas v. Bica*, above, the INA involved only the terms of admission into the country.⁴⁰

In the present case, the unlawfully discharged employees may well have remained in the United States and may be available to resume employment. In accordance with IRCA, however, the Respondent may not knowingly employ an undocumented alien. Thus, we temper our traditional reinstatement remedy so that IRCA's provisions are satisfied. Accordingly, the Respondent is ordered to offer discriminatees Benavides and Guzman reinstatement, provided that they present, within a reasonable time, INS Form I-9 and the appropriate supporting documents, in order to allow the Respondent to meet its obligations under IRCA.

Such conditional remedies have been used in other cases when reinstatement would require removal of a legal disability. For example, in *NLRB v. Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990), the Second Circuit modified the Board's remedy to condition the reinstatement of a driver whose license had been suspended on his presentation of a valid driver's license within a reasonable period of time. Particularly in light of the fact that legal immigrant status is much more difficult to obtain than the driver's license at issue in *Future Ambulette*, we find that a conditional remedy strikes a balance between the policies underlying our normal reinstatement remedy and the practical circumstances of this case. A conditional remedy also permits us to approximate as nearly as possible the Board's traditional reinstatement remedy without promoting unlawful action under IRCA.⁴¹

In addition, we continue to believe that awarding backpay to Benavides and Guzman effectuates the

issues, however, can only be raised under conditions that comply with the provisions of IRCA.

⁴⁰ 424 U.S. at 359.

⁴¹ This remedy is also fully consistent with the Supreme Court's statement in *Lopez-Mendoza*, supra, that an employee is not entitled to prospective relief, including reinstatement, "while he maintains the status of an illegal alien." 468 U.S. at 1047-1048 fn. 4.

policies of the Act. Backpay under the circumstances of this case provides a measure of compensatory relief for the Respondent's unlawful discharges without requiring the reestablishment of an employment relationship in contravention of the policies of IRCA. The Board found in its previous decision that Benavides and Guzman informed the Respondent of their unauthorized immigration status when they were interviewed and that their discharges were the result not of that status but rather of their support for the Union. Therefore, we conclude that these employees would have retained their jobs with the Respondent but for their union activities and the Respondent's unlawful retaliation for them.

In *Sure-Tan*, the Supreme Court did not foreclose the possibility of backpay for unlawfully discharged undocumented aliens. Rather, the Court criticized the Seventh Circuit for selecting a 6-month minimum backpay period without an evidentiary basis, and found that the employees there, who had left the country, were to be deemed unavailable for backpay during any period when they were not "lawfully entitled to be present and employed in the United States."⁴² Unlike *Sure-Tan*, however, in which the Court sought to avoid sponsoring a violation of the INA by encouraging the employees to reenter the country illegally, the award of backpay in this case, in which the employees may remain in the United States, does not promote illegal reentry. Nor does the backpay, as limited by this decision, induce the Respondent to illegally rehire the discriminatees in order to terminate its backpay liability. Instead, the backpay remedy serves to place the employees for a limited time in the position that they would have been but for the Respondent's unlawful conduct.⁴³

With these purposes in mind, we shall order that the Respondent pay the employees backpay from the dates of their discharges to the earliest of the following: their reinstatement by the Respondent, subject to compliance with the Respondent's normal obligations under IRCA, or their failure after a reasonable time to produce the documents enabling the Respondent to meet its obligations under IRCA to verify their eligibility for employment in the United States.⁴⁴

⁴² *Sure-Tan*, 467 U.S. at 903.

⁴³ Contrary to Member Cohen's reliance on *Del Rey*, we agree with the reasoning of the Ninth Circuit in *Felbro* that backpay may be awarded despite a discriminatee's legal disability, and that failure to order such a remedy in cases such as this provides employers an incentive to disregard their obligations under Federal labor and immigration laws.

⁴⁴ Under established Board law, "if an employer satisfies its burden of establishing that the discriminatee engaged in unprotected conduct for which the employer would have discharged any employee, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct." *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993) (citing, *inter alia*, *John Cuneo*, 298 NLRB 856, 856-857 (1990)), *affd.* in part 39

We deny the additional remedy requested by the General Counsel, i.e., ordering the Respondent to hire applicants referred by the Union to replace Benavides and Guzman in the event that they are unable to be eligible for reinstatement. Although, as Member Browning points out, the remedies available in the absence of reinstatement may be an imperfect means of demonstrating to employees the vindication of the discriminatees' rights and restoring the Union to its prior level of employee support, we nonetheless conclude that they are sufficient under the circumstances of this case.⁴⁵

Contrary to Member Browning's view, we do not find the present situation analogous to the circumstances in which the Board's established *Transmarine*⁴⁶ remedy is applied. The *Transmarine* remedy is directed at a situation involving a direct and unlawful refusal to bargain, not a discriminatory discharge. It is ordered where an employer has violated Section 8(a)(5) by failing to notify and bargain with the union as the representative of its employees before closing its facility. In that context, the *Transmarine* construct is meant to ensure that the union has *some* leverage for meaningful bargaining even though the facility has been closed and the employees terminated. In contrast to the virtually complete vitiation of the union's ability to bargain on behalf of a unit when no employees are currently working that characterizes *Transmarine* cases, the present case entails only a speculative loss of union strength resulting from the Respondent's discharge of two individual employees in violation of Section 8(a)(3). Although we recognize that the Respondent's unlawful discharges have some implications for the remaining employees and the Union, we find that the rationale supporting the *Transmarine* remedy does not support the proposed additional remedy.

ORDER

The National Labor Relations Board orders that the Respondent, A.P.R.A. Fuel Oil Buyers Group, Inc.,

F.3d 1312 (5th Cir. 1994). In this case, however, in view of the Respondent's knowledge of the employees' unauthorized immigration status at the time of their initial employment, the Respondent is precluded from alleging that it would have terminated them on this basis.

⁴⁵ Chairman Gould believes that the Board does not have the authority in the circumstances of this case to grant the additional remedy urged by Member Browning. See *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 244 (1953); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 235-236 (1938).

Member Cohen believes that the Board lacks the power to order an employer to hire an employee (other than a discriminatee) whom the employer, for nondiscriminatory reasons, does not wish to hire. In addition, even assuming arguendo that the Board has that power, Member Cohen believes that the exercise of such power would be unnecessary and inappropriate in this case.

⁴⁶ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

Prudential Transportation, Inc., and Amer-National Heating Service, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Victor Benavides and Alberto Guzman immediate and full reinstatement to their former positions of employment or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986, and make Victor Benavides and Alberto Guzman whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in this decision. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(b) Remove from its files any reference to the discharges of Victor Benavides and Alberto Guzman, and notify these employees in writing that this has been done and that the evidence of this unlawful activity will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."⁴⁷ Copies of the notice on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER BROWNING, dissenting in part.

I agree with Chairman Gould and Member Truesdale that the Respondent should be ordered to

⁴⁷If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

offer discriminatees Benavides and Guzman conditional reinstatement, but I disagree with one of the limitations my colleagues place on the discriminatees' backpay. In addition, because I believe that reinstatement and backpay remedies are insufficient under the circumstances of the instant case to restore fully the status quo ante, I dissent from my colleagues' failure to order the additional remedy set forth below.

I.

The plurality tolls backpay as of the date the discriminatees are lawfully reinstated or "when, after a reasonable period of time, they are unable to produce the documents enabling the Respondent to meet its obligations under IRCA." The latter limitation on backpay is not consistent with the position of the General Counsel. As stated in his supplemental brief concerning remedy, it is the General Counsel's position that if, within a reasonable period of time, a discriminatee seeks the permission of the INS to work, backpay should at least continue until the INS acts on the discriminatee's request.

I agree with the General Counsel. In cases when undocumented discriminatees timely apply to INS for permission to work, backpay should continue until the INS acts on the employees' request. The plurality decision allows for the possibility that backpay may lapse during the application process, even if the INS ultimately grants the discriminatee permission to work. Such a result is not only inequitable, but also it is inconsistent with the plurality's own findings that the discriminatees "would have retained their jobs with the Respondent but for their union activities" and that the discriminatees are entitled to "full redress for [the] violations of their Section 7 rights" so long as the Board does not require "the reestablishment of an employment relationship in contravention of the policies of IRCA." To the extent there are uncertainties and ambiguities, it is a well-established remedial principle that "the backpay claimant should receive the benefit of any doubt rather than the Respondent, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved." *United Aircraft Corp.*, 204 NLRB 1068 (1973). Accordingly, I dissent from the plurality's unwarranted limitation on the employees' backpay.

II.

In his supplemental brief concerning remedy, the General Counsel submits that in the event that Benavides and Guzman are unable to become eligible for reinstatement, the Respondent should be required to hire applicants referred by the Union in place of the

discriminatees.¹ The General Counsel's position is that the Union's right to refer applicants would be triggered by: (1) the discriminatee's failure, within a reasonable period of time, to seek the permission of the INS to work; or (2) the INS's rejection of the discriminatee's request for permission to work.

For the following reasons, I agree with the General Counsel that such a remedy is appropriate under the circumstances of the instant case. I begin with the proposition relied upon by my colleagues that the Board has "broad discretionary" authority to fashion appropriate remedies that will best effectuate the policies of the Act. *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969). The Board's remedies should, to the extent possible, restore the parties to the status quo ante by providing redress for all of the harm done by the Respondent. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

In order to determine the status quo ante and the extent of harm done by the Respondent, we must look to the situation as it existed before Benavides and Guzman were unlawfully discharged. The employees were engaged in a successful organizing drive and Benavides and Guzman were union supporters. By unlawfully discharging Benavides and Guzman, the Respondent not only harmed Benavides and Guzman, but also chilled other unit employees in the exercise of their Section 7 right to engage in union activity. In addition, the unlawful removal from the unit of two union supporters diluted the Union's strength and consequently had a detrimental effect on the Section 7 right of the employees remaining in the unit "to bargain collectively through representatives of their own choosing."

In the usual Board case, the adverse effects of discriminatory discharges on the Section 7 rights of other unit employees tend to be remedied by the traditional Board Order of reinstatement with backpay. The very presence of the discriminatee at his old job reassures others that the law protects their right to engage in union activity and that, if their rights are infringed, the Board is able to come to their aid. In addition, by returning a union adherent to the plant, the reinstatement remedy restores the Union's support among bargaining unit employees.

By contrast, in this case, when the discriminatees are not likely to be lawfully reinstated, the remedies ordered by my colleagues are simply insufficient to remedy the harm done to the Section 7 rights of the remaining employees in the unit. In order to restore adequately the status quo ante and remedy the effects of the unlawful conduct on the remaining unit employees,

¹ The General Counsel states that there is a "substantial probability" that Guzman and Benavides will be unable to become eligible for lawful reinstatement in view of their status as undocumented aliens.

in the event these two discriminatees cannot be lawfully reinstated, I agree with the General Counsel that their positions should be filled by other employees referred by the Union. In my view, such a remedy is not punitive and would not adversely impact on the Respondent's ability to manage its work force.² Rather, it effectuates two important policies of the Act: ensuring meaningful bargaining and protecting employee exercise of the rights guaranteed by Section 7.

Although this remedy is novel, it is supported by analogy to the *Transmarine*³ remedy the Board provides for a violation of the statutory obligation to bargain over the effects of a decision to cease operation. That remedy "is designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent."⁴ The Board subsequently stated that restoring the union's bargaining strength is the more important objective.⁵

I believe that in the instant case, the remedy advocated by the General Counsel can best "recreate in some practicable manner" the situation that existed prior to the Respondent's unlawful conduct. Here, the unlawful discharge of Benavides and Guzman has had a direct impact on the unit employees' exercise of their Section 7 rights to engage in union activity and to bargain collectively through representatives of their own choosing. Because of the likelihood that Benavides and Guzman will not be able to return to the unit, a conditional reinstatement remedy alone will not, in my view, serve to "undo the effects of [the] violations of the Act." *Seven-Up Bottling Co.*, supra, 344 U.S. at 346. The loss of two union adherents could be devastating in the circumstances of this case in which the unit consists of only 19 employees and the Union will be attempting to negotiate an initial contract with an employer harboring a virulent antiunion animus.⁶ Al-

² I would limit the Union's right to refer applicants to situations when vacancies actually exist (i.e., I would not require the Respondent to displace employees currently working by union-referred applicants). I would further require that the union-referred applicants be otherwise qualified for the position.

Contrary to the Respondent's contention, there is little to be gained by engaging in a semantic "debate about what is 'remedial' and what is 'punitive.'" It seems more profitable to stick closely to the direction of the Act by considering what order does . . . and what order does not, bear appropriate relation to the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348 (1953). As discussed infra, because the General Counsel's referral remedy bears a close "relation to the policies of the Act," it falls within the Board's remedial authority under *Seven-Up Bottling Co.*

³ *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

⁴ *Id.* at 390.

⁵ *O. L. Willis, Inc.*, 278 NLRB 203, 205 (1986).

⁶ In its original decision, the Board characterized the Respondent's unfair labor practices as "flagrant," "numerous," and "pervasive." Further, the Board stated: "[M]ost of the misconduct in this case

lowing the Union to refer applicants in lieu of Benavides and Guzman will effectively restore some of the union support lost as a result of the Respondent's misconduct and will provide some way to remedy the chilling effect on unit employees' exercise of their Section 7 rights. Accordingly, because I believe that the General Counsel's requested union referral remedy would best effectuate the policies of the Act, I dissent from my colleagues' failure to grant it.

MEMBER COHEN, dissenting in part.

I agree with my colleagues' conditional reinstatement of discriminatees Benavides and Guzman, who are undocumented aliens. I dissent, however, with respect to awarding them backpay. In my view, it would be inappropriate to award backpay to Benavidez and Guzman for periods when they cannot establish their legal eligibility to work.

In *Del Rey*, supra, the court agreed with the view expressed in Judge Beezer's partial dissent in *Local 512*, supra, that

[A]n undocumented alien has not been legally harmed by a lay-off or termination. An alien who had no right to be present in this country at all, and consequently had no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he had no entitlement. It may promote the purpose of the NLRA to guarantee the collective bargaining rights of the NLRA to every employee, regardless of immigrant status. But the award provisions of the NLRA are remedial, not punitive, in nature, and thus should be awarded only to those individuals who have suffered harm.

The *Del Rey* court, applying the Supreme Court's decision in *Sure-Tan*, supra, went on to hold that the *Del Rey* discriminatees could not receive backpay for any period when they were not lawfully entitled to be present and employed in the United States. *Id.* at 1121. The court further held that the Immigration Reform and Control Act of 1986, which makes it unlawful for an employer to hire an undocumented alien, clearly bars the Board from awarding backpay to undocumented aliens who are unlawfully discharged after its enactment, *id.* at 1122, and that aliens seeking backpay under the NLRA have the burden of coming forward with documents establishing their lawful entitlement to be present in the United States. *Id.* at 1122–1123.

was committed by the Respondent's highest officials, who are still in charge of the Respondent's operations, and the breadth of their unfair labor practices shows that the Respondent, through these officials, is deeply committed to opposing the Union without regard to the lawfulness of its means and is not likely to retreat from that strategy." *A.P.R.A. Fuel Oil*, 309 NLRB 480, 481 (1992), *enfd.* 28 F.3d 103 (2d Cir. 1994).

In *Sure-Tan*, the Supreme Court noted that the Board, in devising remedies for unfair labor practices, is obliged to take into account the equally important Congressional objective of deterring unauthorized immigration. *Sure-Tan*, supra, at 903. In computing backpay, the Court stated, employees must be deemed unavailable for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States. *Id.* The Court stated that it shared "the Court of Appeals' uncertainty concerning whether any of the discharged employees will be able . . . to establish at the compliance proceedings that they were lawfully available for employment during the backpay period." *Id.* at 904. Nevertheless, the Court said, any perceived deficiencies in the NLRA's existing remedial arsenal can be addressed only by Congressional action. *Id.* Disagreeing with Justice Brennan's view that the discriminatees were effectively deprived of any remedy, the Court noted that its decision left intact the cease-and-desist order imposed by the Board and that if the employer were to engage in similar illegal conduct, it would be subject to contempt proceedings and penalties, which would be significant deterrents to future violations. *Id.*¹

In my view, it is immaterial whether the discriminatees had left the country. They had done so in *Sure-Tan*, but not in *Del Rey*. The result was the same, i.e., no backpay for periods when the discriminatees were not lawfully entitled to work. Thus, the policy arguments marshaled by the majority are simply beside the point. Benavides and Guzman were unavailable for work as a matter of law during any period when they were not lawfully entitled to be present and employed in the United States.

My colleagues' award of backpay is inconsistent with their limitations on reinstatement. They correctly say that reinstatement is to be conditioned on the employee's demonstration of eligibility for lawful employment. Phrased differently, there is to be no reinstatement unless and until such eligibility is established. My colleagues, however, nonetheless award backpay for periods when the employee has not demonstrated such eligibility. This position is directly contrary to backpay principles. Under established principles, backpay is awarded for periods when lawful employment is available for the discriminatee, and

¹ My colleagues spend a considerable amount of time speaking of the evils of the unlawful conduct involved herein. I agree that the conduct is forbidden and must be stopped. As noted, however, the cease-and-desist order does precisely that. It is enforceable by court decree and by contempt sanctions. The issue is whether it is necessary and appropriate to use backpay as a further discouragement of unlawful activity. I conclude that it is not. Backpay is a remedial measure to compensate victims. It is not a punitive sanction to deter future misconduct. Further, as discussed supra, such backpay is inconsistent with principles and policies of immigration law.

such employment is being withheld. In the instant case, my colleagues award backpay for periods when lawful employment for the discriminatee is not available, i.e., for periods when the discriminatee lacks certification or other permission to work.²

Finally, my colleagues rely on a House Committee Report for the proposition that IRCA was not intended to limit the remedial powers of the NLRB. Although there is generalized language that may support this view, the particularized language does not do so. In this regard, I note that the Report says:

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 7 and 8 of the Act.

Thus, the particularized language of the Report simply says that the *Sure-Tan* principle (undocumented aliens are employees) continues to apply.

In sum, applying the principles of *Del Rey* and *Sure-Tan* to the facts of this case, I would not award backpay to Benavides and Guzman for any period when they were not lawfully entitled to be present and employed in the United States, and I would place the burden of coming forward with documents establishing any such entitlement on the General Counsel.

²My colleagues limit this period to a “reasonable period of time.” However, this does not cure the problem. During that “reasonable period,” the discriminatee is, at best, seeking documented status but has not secured it. At worst, the discriminatee is doing nothing to acquire documented status.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL offer Victor Benavides and Alberto Guzman immediate and full reinstatement to their former positions of employment or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow us to meet our obligations under the Immigration Reform and Control Act of 1986. WE WILL make Victor Benavides and Alberto Guzman whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them in the manner set forth in the Board’s Supplemental Decision.

WE WILL remove from our files any reference to the discharges of Benavides and Guzman, and will notify them, in writing, that this has been done and that evidence of this unlawful action will not be used as a basis for future personnel action against them.

A.P.R.A. FUEL OIL BUYERS GROUP,
INC., PRUDENTIAL TRANSPORTATION,
INC., AND AMER-NATIONAL HEATING
SERVICE, INC.