No. 00-1595

In the Supreme Court of the United States

HOFFMAN PLASTIC COMPOUNDS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

THEODORE B. OLSON
Solicitor General
Counsel of Record

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether an order of the National Labor Relations Board directing petitioner to pay back pay to an employee who was discriminatorily laid off for union-organizing activity in violation of Section 8(a)(3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(3), but only up to the date on which petitioner discovered that the employee was an undocumented alien not authorized to be employed in the United States, is a proper exercise of the Board's authority to remedy petitioner's violation of Section 8(a)(3) of the Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations—Continued: Page

In the Supreme Court of the United States

No. 00-1595

HOFFMAN PLASTIC COMPOUNDS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-36a) is reported at 237 F.3d 639. The prior opinion of the court of appeals panel (Pet. App. 37a-77a) is reported at 208 F.3d 229. The second supplemental decision and order of the National Labor Relations Board (Pet. App. 78a-87a) and the decision of the administrative law judge (Pet. App. 88a-95a) are reported at 326 N.L.R.B. 1060. Prior decisions and orders of the Board are reported at 314 N.L.R.B. 683 and 306 N.L.R.B. 100.

JURISDICTION

The judgment of the en banc court of appeals was entered on January 16, 2001. The petition for a writ of certiorari was filed on April 16, 2001, and was granted on September 25,

2001. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 8(a)(3) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(3), makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." Under Section 8(a)(3), "if the employer fires an employee for having engaged in union activities and has no other basis for the discharge, or if the reasons that he proffers are pretextual, the employer commits an unfair labor practice." *NLRB* v. *Transportation Mgmt. Corp.*, 462 U.S. 393, 398 (1983). Section 10(c) of the Act authorizes the National Labor Relations Board (Board) to order, as a remedy for a violation of Section 8(a)(3), that the employer "cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay." 29 U.S.C. 160(c). Awards of back pay have historically been a core part of the Board's remedial authority under the Act. See *NLRB* v. *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-263 (1969) (discussing importance of back pay remedy); *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347 (1953) (noting that the Board has provided for back pay from its "very first published order"); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197-200 (1941).

b. In *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), this Court held, in agreement with the Board, that an alien not lawfully present in the United States is entitled to the protections of the NLRA as an "employee" within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). See *Sure-Tan*, 467 U.S. at 891-894. The Court also sustained the Board's ruling in that case that the employer had violated Section 8(a)(3) of the Act when it constructively discharged its un-

documented alien workers by reporting them to the Immigration and Naturalization Service (INS), which resulted in the employees' arrest and immediate voluntary departure from the United States to Mexico in lieu of deportation. See 467 U.S. at 886-888, 898-906.

As a remedy for the violation in the *Sure-Tan* case, the Board had "ordered the conventional remedy of reinstatement with backpay, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902.[1] The court of appeals modified the Board's remedial order to require reinstatement "only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement," and to deny back pay to discriminatees "unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *NLRB* v. *Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982), rev'd in part, 467 U.S. 883 (1984); see also 467 U.S. at 889. The court of appeals observed, however, that the discriminatees might not have been lawfully available for employment in the United States before the new offers of reinstatement were extended, and thus might receive no back pay at all. 672 F.2d at 606. To avoid such a situation, the court of appeals directed that the alien employees who had left the United States be awarded a minimum of six months' back pay, reasoning that was "the minimum during which the discriminatees might reasonably have remained

---

[1] The Board in *Sure-Tan* declined to adopt the suggestion of an administrative law judge that the undocumented alien employees be afforded a minimum of four weeks' back pay, and instead directed that the compliance proceedings determine whether "the employees had in fact been available for work" for any period in which back pay might be awarded. 467 U.S. at 889.

employed without apprehension by INS, but for the employer's unfair labor practice." *Ibid.*

This Court held that the minimum six-month back pay award imposed by the court of appeals "constitute[d] pure speculation and [did] not comport with the general reparative policies of the NLRA." *Sure-Tan*, 467 U.S. at 901. As the Court explained, such an order departed from the requirement that a remedy "be adapted to the situation which calls for redress." *Id.* at 900. The Court agreed with the court of appeals, however, that "the implementation of the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal readmittance to the United States." *Id.* at 902-903. That condition on the discriminatees' remedy, the Court stated, was appropriate to accommodate "the objective of deterring unauthorized immigration" reflected in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* See 467 U.S. at 903.[2] The Court added (*ibid.*):

> By conditioning the offers of reinstatement on the employees' legal reentry, a potential conflict with the INA is thus avoided. Similarly, in computing backpay, the 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.

c. Subsequent to *Sure-Tan*, Congress amended the INA by enacting the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. In a substantial

---

[2] The Court observed that, under the version of the INA then in effect, "[t]he central concern of the INA [was] with the terms and conditions of admission to the country and the subsequent treatment of aliens lawfully in the country," and the INA reflected at most "a peripheral concern with employment of illegal entrants." *Sure-Tan*, 467 U.S. at 892 (internal quotation marks omitted).

change from prior law (see note 2, *supra*), IRCA made it unlawful for employers knowingly to employ aliens not authorized to obtain employment in the United States. Congress provided in IRCA that "[i]t is unlawful for a person or other entity—(A) to hire * * * for employment in the United States an alien knowing the alien is an unauthorized alien * * * or (B) to hire for employment in the United States an individual without complying with the requirements of subsection (b)." 8 U.S.C. 1324a(a)(1).[3] "[T]he requirements of subsection (b)" referred to in Section 1324a(a)(1)(B) are set forth in Section 1324a(b), which establishes an "employment verification system" that obligates each employer to examine specified kinds of documents to verify that a person whom it wishes to hire is not an "unauthorized alien." 8 U.S.C. 1324a(b). In addition, Section 1324a(a)(2) of Title 8, as added by IRCA, makes it unlawful for a person, after hiring an alien for employment in accordance with paragraph (1) (*i.e.*, Section 1324a(a)(1)), "to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." 8 U.S.C. 1324a(a)(2).

An employer who violates Section 1324a may be subject to civil and criminal penalties. See 8 U.S.C. 1324a(e)(4) and (5) (civil penalties); 8 U.S.C. 1324a(f)(1) (criminal penalties). Any penalties apply, however, only if the employer has knowingly hired or retained an unauthorized alien or has not complied with the employment verification system.[4]

---

[3] IRCA defines "unauthorized alien" to mean, "with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General." 8 U.S.C. 1324a(h)(3).

[4] An employer that violates IRCA's prohibition against knowingly hiring or continuing to employ an unauthorized alien is subject to an escalating range of civil penalties from $275 to $11,000. See 8 U.S.C.

In addition to placing new restrictions on the hiring practices of employers, IRCA also prohibited certain conduct by individuals seeking employment. Under 18 U.S.C. 1546(b), as amended by IRCA, it is a criminal offense for a person to use "an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, [or] * * * that the document is false, * * * for the purpose of satisfying a requirement of" the employment verification system established by Section 1324a(b). See 18 U.S.C. 1546(b)(1) and (2).

2. Following the Court's decision in *Sure-Tan* and the enactment of IRCA, the Board considered in several cases whether undocumented alien workers who had not departed from the United States remained eligible for the remedies of reinstatement or back pay.[5] Most extensively, in *A.P.R.A.*

1324a(e)(4)(A); 8 C.F.R. 274a.10(b)(1). An employer that engages in a "pattern or practice" of violations is subject to a criminal fine of not more than $3000 for each such violation, and to imprisonment not to exceed six months "for the entire pattern or practice." 8 U.S.C. 1324a(f)(1). An employer that violates IRCA's prohibition against hiring an individual without complying with the "employment verification system" (see 8 U.S.C. 1324a(a)(1)(B), 1324a(b)) is subject only to a civil penalty, ranging from $110 to $1100 per violation. 8 U.S.C. 1324a(e)(5); 8 C.F.R. 274a.10(b)(2).

[5] Initially, the Board interpreted *Sure-Tan*'s rule requiring the tolling of any back pay period as applying to all undocumented alien workers, whether or not they remained in the United States during the back pay period. See *Felbro, Inc.*, 274 N.L.R.B. 1268, 1269 (1985), enf. denied, 795 F.2d 705 (9th Cir. 1986). The Ninth Circuit rejected the Board's reading of *Sure-Tan* and concluded that *Sure-Tan* "barred from backpay only those undocumented workers who were unavailable for work in the backpay period because they were outside the United States without entry papers." *Local 512, Warehouse & Office Workers' Union* v. *NLRB (Felbro, Inc.)*, 795 F.2d 705, 722 (1986). The Board subsequently reexamined the issue in light of the Ninth Circuit's decision and adopted that court's reading of *Sure-Tan*. See *Del Rey Tortilleria, Inc.*, 302 N.L.R.B. 216, 219-220 (1991), enf. denied, 976 F.2d 1115 (7th Cir. 1992). The Board has since adhered to the *Felbro* court's reading of *Sure-Tan*. See *A.P.R.A. Fuel Oil Buyers*

Fuel Oil Buyers Group, Inc., 320 N.L.R.B. 408 (1995), enf'd, 134 F.3d 50 (2d Cir. 1997), the Board considered the situation of an employer who had knowingly hired undocumented workers in violation of IRCA, and then discharged them for union activities in violation of Section 8(a)(3) of the NLRA. Seeking to accommodate the policies of both the NLRA and IRCA, the Board concluded that a limited award of back pay and a conditional order of reinstatement would effectuate the policies of the NLRA by affording the alien workers meaningful redress for the violation of that Act, without requiring the reestablishment of an employment relationship in violation of IRCA. See *A.P.R.A. Fuel*, 320 N.L.R.B. at 415-416.[6] As the Board explained, the fired employees "would have retained their jobs with [the employer] but for their union activities and the [employer's] unlawful retaliation for them." *Id.* at 416. And the Board stressed that, unlike the situation in *Sure-Tan*, "in which [this] Court sought to avoid sponsoring a violation of the INA by encouraging the employees to reenter the country illegally," an appropriately limited award of back pay to an undocumented alien who has never left the United States "does not promote illegal reentry" and also does not "induce [the employer] to illegally rehire the discriminatees in order to terminate backpay liability." *Ibid.* Rather, the Board noted, "the

---

Group, Inc., 320 N.L.R.B. 408, 415 (1995), enf'd, 134 F.3d 50 (2d Cir. 1997); Pet. App. 83a n.8.

[6] The remedy of reinstatement under *A.P.R.A. Fuel* is available to discharged employees only upon "their satisfaction of the normal verification of eligibility requirements prescribed by IRCA." 320 N.L.R.B. at 415. The back pay period under *A.P.R.A. Fuel* terminates when the alien employees are reinstated, "subject to compliance with the [employer's] normal obligations under IRCA" to verify their eligibility for employment in the United States, or when the employees, after a reasonable period of time, fail to produce "the documents enabling the [employer] to meet its obligations under IRCA," whichever date is earlier. *Id.* at 416.

backpay remedy serves to place the employees for a limited time in the position that they would have been but for the [employer's] unlawful conduct." *Ibid.*

The Board in *A.P.R.A. Fuel* indicated, moreover, that in light of the policies of IRCA, it would not order reinstatement in a case where the employer did *not* know, at the time of hire, that the employee whom it subsequently discharged in violation of the NLRA was not authorized to work in the United States under IRCA, but rather learned of that fact only after the discharge. See *A.P.R.A. Fuel*, 320 N.L.R.B. at 415 n.39, 416 n.44. As the Board noted, 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." *Id.* at 416 n.44 (internal quotation marks and citations omitted). Thus, an employer who hires an employee in conformity with IRCA's employment-verification system and believes in good faith that the employee is authorized to work in the United States, but who subsequently learns that the employee is an undocumented alien not authorized for employment, may take advantage of this after-acquired evidence rule to terminate its liability for back pay and to avoid reinstatement altogether, even if it has discharged the employee in violation of Section 8(a)(3) of the NLRA.

3. a. Petitioner produces polyvinyl chloride pellets. In May 1988, petitioner hired Jose Castro to work as a compounder in petitioner's plant. Pet. App. 40a; *Hoffman Plastic Compounds, Inc.*, 306 N.L.R.B. 100, 101, 104 (1992). Prior to hiring Castro, petitioner, as required by IRCA (see p. 5, *supra*), examined documents tendered by Castro to verify that he was authorized to work in the United States.

Those documents appeared to be genuine and related to the person presenting them. Pet. App. 85a & n.11.

Later in 1988, the United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL-CIO, began a union-organizing campaign at petitioner's plant. Castro supported the organizing campaign and distributed authorization cards to co-workers. Pet. App. 5a; *Hoffman Plastic Compounds*, 306 N.L.R.B. at 102, 108. On January 31, 1989, petitioner laid off Castro and all of the other employees who had engaged in organizing activities. Pet. App. 5a.

b. On January 22, 1992, the Board issued a decision finding that petitioner had unlawfully responded to the union's organizing campaign by discriminatorily selecting Castro and three other employees for layoff "in order to rid itself of known union supporters," contrary to Section 8(a)(3) of the NLRA. *Hoffman Plastic Compounds*, 306 N.L.R.B. at 100; see also *id.* at 100 n.1 (finding that Castro "had sufficient seniority * * * that he would not have been laid off but for [petitioner's] discrimination against him"); Pet. App. 5a, 79a. The Board ordered petitioner, *inter alia*, to offer reinstatement to Castro and the other discriminatees, and to make them whole for lost earnings, with the amount to be determined at a compliance hearing before an administrative law judge (ALJ). *Hoffman Plastic Compounds*, 306 N.L.R.B. at 100, 107; Pet. App. 5a, 79a. Thereafter, petitioner entered into a stipulation with the Board's General Counsel, whereby petitioner waived its right to seek judicial review of the Board's January 22, 1992, decision and order. Pet. App. 88a.

c. The parties then proceeded to the compliance hearing before the ALJ. On June 14, 1993, the final day of the hearing, Castro testified that he was born in Mexico and that, to obtain employment with petitioner in 1988, he had tendered a birth certificate that "is not his own," but rather "is for an individual born in El Paso, Texas." Pet. App. 80a. He further testified, "[T]he birth certificate was loaned to me so

that I can secure a job." *Ibid.* Based on Castro's testimony, the ALJ recommended that Castro be denied reinstatement and awarded no back pay. *Id.* at 94a-95a.

On September 23, 1998, the Board reversed the ALJ's decision in part. Pet. App. 78a-87a. Relying on its decision in *A.P.R.A. Fuel*, the Board rejected petitioner's contention that *Sure-Tan* and IRCA bar any award of back pay to Castro in light of his testimony before the ALJ. *Id.* at 84a. The Board found, however, that petitioner had "attempted to comply with IRCA when it hired Castro," that it "would not have offered Castro initial employment had it known of his unauthorized immigration status," and that it "did not learn until the back-pay hearing that Castro used fraudulent identification in applying for employment." *Ibid.* Applying the "after-acquired knowledge" rule adverted to in *A.P.R.A. Fuel* (see p. 8, *supra*), the Board concluded that "Castro is not entitled to reinstatement, and backpay shall terminate on June 14, 1993, the date [petitioner] learned that Castro used fraudulent identification to gain employment." *Id.* at 85a.[7] A dissenting Board Member would have denied Castro all back pay. *Id.* at 87a.

---

[7] The Board generally defines the back pay period as commencing on the date of the discharge (or other discriminatory action) and ending on the date on which the employer extends the employee a proper offer of reinstatement. See *Seven-Up Bottling*, 344 U.S. at 347; *F.W. Woolworth Co.*, 90 N.L.R.B. 286, 292-293 (1950). In this case, petitioner attempted to make Castro an offer of reinstatement on March 10, 1989, before the Board's decision of January 22, 1992, finding petitioner in violation of the NLRA and ordering relief. See Pet. App. 80a. Petitioner's offer of reinstatement, however, did not toll its back pay liability to Castro because, the Board found, that offer was not "specific, unequivocal, and unconditional." *Id.* at 81a. Petitioner did not challenge that finding by the Board in the court of appeals. The Board awarded Castro $66,951 (plus interest). It found that Castro had satisfied his obligation to mitigate his damages by obtaining interim work. *Id.* at 85a & n.12.

4. Petitioner filed a petition for review of the Board's order in the court of appeals. A panel of the court of appeals denied the petition for review. Pet. App. 37a-77a. After rehearing the case en banc, the court again denied the petition for review and enforced the Board's order. *Id.* at 1a-36a.

The en banc court rejected petitioner's contention that *Sure-Tan* prohibits the Board from awarding any back pay to Castro. Pet. App. 7a. That contention, the court noted, is based on "a single sentence from *Sure-Tan*," but "[r]ead in context, the *Sure-Tan* sentence does not bar backpay to undocumented discriminatees." *Ibid.*[8] The court explained that to construe that passage as establishing an absolute bar to back pay "would conflict with the Court's holding [in *Sure-Tan*] that an undocumented discriminatee is entitled to backpay so long as it is appropriately tailored to the discriminatee's actual loss." *Id.* at 8a. The court further observed that the restriction set forth in the sentence at issue had been fashioned by the Seventh Circuit, and was adopted by this Court "to ensure that the *Sure-Tan* discriminatees who had left the country would not reenter illegally to claim backpay." *Id.* at 11a.

The court also rejected petitioner's alternative contention that, "even if *Sure-Tan* does not bar backpay to undocumented discriminatees, IRCA does." Pet. App. 14a. The court explained that "IRCA neither amends nor repeals the NLRA or any other labor law," and "IRCA's legislative history * * * shows that Congress did not intend the statute to limit the NLRA even indirectly." *Ibid.* And it

---

[8] The relevant sentence reads: "[I]n computing backpay, the 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." *Sure-Tan*, 467 U.S. at 903. See also p. 4, *supra*.

rejected petitioner's contention that, even "[a]bsent a statutory bar * * * the Board's backpay award fails to accommodate IRCA's goal of limiting the hiring of undocumented workers." *Id.* at 16a. As the court explained:

> The Board crafted the limited backpay remedy to avoid conflict with IRCA and to implement its understanding of the purposes of both IRCA and the NLRA. According to the Board, the limited backpay award reduces employer incentives to prefer undocumented workers (IRCA's goal), reinforces collective bargaining rights for all workers (the NLRA's goal), and protects wages and working conditions for authorized workers (the goal of both Acts).

Id. at 23a.[9]

SUMMARY OF ARGUMENT

The National Labor Relations Board acted reasonably and within its authority in ordering a limited award of back pay to Jose Castro as a remedy for petitioner's violation of Section 8(a)(3) of the National Labor Relations Act (NLRA). Contrary to petitioner's contentions, that back pay award, which terminates as of the date that petitioner learned that Castro was an undocumented alien and therefore could not

---

[9] Judge Sentelle, joined by Judges Henderson and Randolph, dissented. Pet. App. 24a-36a. Judge Sentelle would have ruled that *Sure-Tan* "definitively answered" the question before the court and would have required vacatur of the Board's back pay award to Castro. *Id.* at 27a. He also believed that the majority "essentially ignore[d]" the "statutory directives of IRCA," and improperly "cho[se] to mediate between [the] statutory 'goals' " of IRCA and the NLRA. *Id.* at 35a. Judge Ginsburg, in a separate dissenting opinion, agreed with Judge Sentelle that *Sure-Tan* "definitively answered the question" before the court, and therefore found it unnecessary "to reach the question whether the Board reasonably reconciled the remedial scheme of the NLRA with the policies embodied in the IRCA." *Id.* at 36a.

be employed because of the Immigration Reform and Control Act of 1986 (IRCA), does not contravene either this Court's decision in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), or IRCA. The award also accommodates and indeed furthers the policies underlying IRCA, and it represents an otherwise proper exercise of the Board's authority to remedy violations of Section 8(a)(3). The back pay award should therefore be upheld.

A. *Sure-Tan* does not hold that the Board is flatly prohibited in all circumstances from awarding back pay as a remedy to an undocumented alien whose rights under the NLRA have been violated. *Sure-Tan* involved undocumented aliens who were reported to the INS by their employer in retaliation for exercising their rights under the NLRA, were taken into custody by the INS, and immediately left the United States. The Court held that a minimum award of six months' back pay to the aliens ordered by the court of appeals was impermissibly speculative, and that although the aliens might be entitled to receive back pay, any such back pay had to be tolled until the aliens demonstrated that they were legally authorized to be present and employed in the United States. The Court perceived that the tolling period was necessary to accommodate the objective embodied in the Nation's immigration laws of deterring unauthorized entry into the United States.

This case, however, differs markedly from *Sure-Tan* in that the discriminatee did not leave the United States labor market, and there is no need to speculate about the period that the discriminatee would have worked for the employer, had the employer not violated the NLRA. Because Castro did not leave the United States, the Board's back pay award does not present the same danger, perceived by the Court in *Sure-Tan*, of encouraging aliens to reenter this country illegally. Furthermore, because petitioner reasonably believed that Castro was authorized for employment when it hired

him, its continued employment of Castro (until it learned he was an undocumented alien) was not prohibited by IRCA. The Board's back pay award also terminated as of the date that petitioner learned it could no longer employ Castro, and the Board did not order reinstatement. Thus, the Board's back pay award does not encourage employers to violate IRCA by hiring undocumented aliens. Nor does the Board's back pay remedy reflect speculation. To the contrary, it remedies Castro's actual economic loss resulting from petitioner's unfair labor practice, in that it is tied to the period that Castro would have continued to work for petitioner. Although petitioner invokes one sentence in the Court's opinion in *Sure-Tan* to argue that no undocumented alien may receive back pay as a remedy for a violation of the NLRA (and possibly other federal labor laws as well), that broad question was not before the Court in *Sure-Tan*, and the Court need not and should not read that sentence in a manner divorced from its context as petitioner suggests.

B. The Board's order appropriately reconciles the policies of the NLRA and IRCA, and indeed it furthers the purposes underlying IRCA. Back pay is a fundamental aspect of the Board's remedial authority under the NLRA and has long been recognized as essential to effective enforcement of the Act. The Board's award also takes account of Castro's misconduct by denying him reinstatement and terminating his back pay when it became clear that, because he was an undocumented alien, petitioner could and would no longer employ him. The Board's after-acquired knowledge rule, terminating back pay as of that date, is very similar to the approach taken by this Court in *McKennon* v. *Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). In addition, the Board's order does not place petitioner into a situation of conflicting obligations. The back pay order does not require petitioner to hire Castro in violation of IRCA, and it runs

only for the time in which petitioner could have employed Castro without violating IRCA.

Appropriately limited back pay for undocumented alien employees who have been subjected to violations of the NLRA promotes enforcement of federal immigration law as well as labor law. Congress, this Court, and the Board have all recognized that employers may have an economic incentive to employ undocumented aliens, because such employees are more willing to work for substandard wages and in subpar working conditions and are unlikely to complain about such wages and conditions in the absence of legal protections. Including undocumented aliens within the protection of federal labor law counteracts that incentive, because it minimizes the danger that employers will obtain a competitive advantage from employing unauthorized workers. If an employer recognizes that it will face the monetary sanction of back pay if it unlawfully discharges an undocumented alien worker in violation of the NLRA, just as if it unlawfully discharged a citizen worker, then it is less likely to perceive an advantage in hiring undocumented aliens. Undocumented aliens in turn will be less likely to seek or obtain employment here.

Based on all these considerations, Congress did not bar undocumented aliens from receiving back pay as a remedy for violations of federal labor laws, and indeed in IRCA it authorized increased enforcement of labor laws by the Department of Labor, in recognition of the fact that such enforcement (including the possibility of back pay awards for undocumented aliens) would deter employment of undocumented aliens and would therefore deter illegal immigration. The flat rule advocated by petitioner, barring undocumented aliens from back pay awards, might therefore undermine effective enforcement of federal immigration and labor laws, and neither *Sure-Tan* nor IRCA requires that result.

ARGUMENT

THE BOARD'S LIMITED AWARD OF BACK PAY IN THIS CASE IS A PROPER EXERCISE OF ITS AUTHORITY TO REMEDY PETITIONER'S VIOLATION OF SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT

The question before the Court in this case is whether the Board acted within its remedial authority in awarding Castro a limited measure of back pay as a remedy for petitioner's violation of the NLRA.[10] Petitioner contends that the Board is precluded from awarding Castro *any* back pay by *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), and by the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359. That contention is incorrect. The passage from *Sure-Tan* on which petitioner relies, understood in light of its context, does not bar the remedy ordered by the Board in this case. Further, the Board's limited back pay order appropriately effectuates the remedial purposes of the NLRA and accommodates the prohibitions against employment of undocumented aliens in IRCA. Accordingly, the Court should uphold the Board's award of back pay to Castro.

---

[10] Petitioner has not challenged in this Court the Board's determination that it engaged in an unfair labor practice by discriminatorily laying off Castro in violation of Section 8(a)(3) of the NLRA. See Pet. App. 88a.

A. This Court's Decision In *Sure-Tan* Does Not Preclude Appropriately Limited Back Pay For Undocumented Alien Employees Discharged In Violation of Section 8(a)(3) Who Are Physically Present In The United States During The Back Pay Period.

1. Petitioner principally contends that the Court's decision in *Sure-Tan* conclusively prohibits any award of back pay to an undocumented alien who is not authorized to work in the United States. Pet. Br. 7-20. That argument is based on one sentence in the *Sure-Tan* opinion, in which the Court stated that, "in computing backpay, the 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." 467 U.S. at 903. Based on that sentence, petitioner argues (Br. 20) that Castro is not entitled to any back pay because he "never was lawfully present during the backpay period and he never was lawfully entitled to work during the backpay period."

As the court of appeals observed (Pet. App. 7a), however, the sentence from *Sure-Tan* upon which petitioner relies would support a conclusion that Castro is not entitled to any back pay only if that sentence is "divorced from *Sure-Tan*'s factual and legal context." In its context, the *Sure-Tan* sentence applies specifically to those undocumented workers who left the United States during the relevant back pay period, and not to employees like Castro, who did not. See Pet. App. 7a-13a.

a. *Sure-Tan* involved undocumented alien employees who were reported by their employer to the INS in retaliation for pro-union activities and who were immediately arrested by INS and granted voluntary departure (in lieu of deportation) from the United States. 467 U.S. at 886-888; see pp. 2-3, *supra*. No evidence in the record indicated

whether the employees had returned to the United States, with or without authorization. The ALJ nevertheless had declined to order any back pay based on a finding that the deported employees were "physically unavailable for work." The Board, noting the absence of evidence on that point, remitted the issue of the employees' availability for work to a compliance hearing. See *Sure-Tan, Inc.*, 234 N.L.R.B. 1187, 1187, 1193 (1978).

On the NLRB's petition for enforcement, the Seventh Circuit limited in some respects and expanded in other respects the remedy ordered by the Board. *NLRB* v. *Sure-Tan, Inc.*, 672 F.2d 604-606. In particular, the Seventh Circuit expressed concern that the undocumented alien employees "might be motivated to reenter the United States unlawfully to claim reinstatement and backpay," and determined that the Board's remedial order required modification to avoid such an incentive. *Id.* at 603. The court therefore modified the Board's remedial order "to require reinstatement only if the discriminatees are legally present and legally free to be employed in this country when they offer themselves for reinstatement." *Id.* at 606. The court further concluded that, "[c]onsistent with our requirement that there be reinstatement only if the discriminatees are legally present and permitted by law to be employed in the United States," it was appropriate for the court to "modify the Board's order so as to make clear * * * that * * * in computing backpay discriminatees will be deemed unavailable for work during any period when not lawfully entitled to be present and employed in the United States." *Ibid.* That statement was the genesis of the proposition ultimately adopted by this Court in respect to back pay awards for undocumented workers. See *Sure-Tan*, 467 U.S. at 903.

The court of appeals also observed in *Sure-Tan*, however, that "[i]n the circumstances of this case it may well be that the discriminatees will not have been lawfully available for

employment in the United States prior to the date of the new offers of reinstatement which will be required," and that "[i]n that event, the discriminatees will receive no backpay." 672 F.2d at 606. Concluding that such a result would be inconsistent with remedial principles of the NLRA, the court ordered the Board to fix a minimum award of six months' back pay for the discriminatees, which the court estimated to be the length of time during which the employees "might reasonably have remained employed without apprehension by INS," had Sure-Tan not reported them to the INS in retaliation for their protected union activity, contrary to the NLRA. *Ibid.*

b. This Court reversed the minimum six months' award of back pay that the court of appeals had ordered, on the ground that such an award would not be "sufficiently tailored to the actual, compensable injuries suffered by the discharged employees." *Sure-Tan*, 467 U.S. at 901. The Court faulted the court of appeals for "'estimat[ing]' an appropriate period of backpay without any evidence whatsoever as to the period of time these particular employees might have continued working before apprehension by the INS and without affording petitioners any opportunity to provide mitigating evidence." *Id.* at 902 n.11. The Court did not accept the employer's argument (see Pet. Br. at 19-23, *Sure-Tan, Inc.* v. *NLRB*, *supra* (No. 82-945)) that, as a matter of law, *any* back pay award for the benefit of the discriminatees would be contrary to federal immigration law. Rather, the Court "generally approve[d] the Board's original course of action in this case by which it ordered the conventional remedy of reinstatement *with backpay*, leaving until the compliance proceedings more specific calculations as to the amounts of backpay, if any, due these employees." 467 U.S. at 902 (emphasis added).

The Court also recognized, however, that the discriminatees had left the United States, perhaps without

authorization to return and obtain employment. The Court therefore concluded that implementation of "the Board's traditional remedies at the compliance proceedings must be conditioned upon the employees' legal *readmittance* to the United States," to accommodate "the objective of deterring unauthorized immigration that is embodied" in the INA. *Sure-Tan*, 467 U.S. at 902-903 (emphasis added). As the Court explained, "[b]y conditioning the offers of reinstatement on the employees' legal *reentry*, a potential conflict with the INA is thus avoided." *Id.* at 903 (emphasis added). And, like the court of appeals, the Court added the proviso that, "[s]imilarly, in computing backpay, the 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." *Ibid.*

c. The opinions of the Board, the court of appeals, and this Court in *Sure-Tan* make clear that the central remedial problem in that case resulted from the fact that, on the very first day of the back pay period (the date of the constructive discharge), all of the discriminatees departed from the United States. See 467 U.S. at 887. By that departure, those workers removed themselves from the United States labor market, under circumstances where they were prohibited by law from reentering that labor market without authorization from federal immigration authorities. Under standard principles of employment law, workers who are "unavailable" for work are ineligible for back pay during the period of their absence from the labor market.[11] Indeed, the

---

[11] For example, periods that an employee is "unavailable" for work because of illness or disability are excluded in computing a back pay award (unless the condition was caused by the employer's unlawful conduct). See 2 B. Lindemann & P. Grossman, *Employment Discrimination Law* 1810-1811 (3d ed. 1996); see also *Miller* v. *Marsh*, 766 F.2d 490, 492 (11th Cir.

workers in *Sure-Tan* were similarly situated to employees who are incarcerated or who are inducted into the armed forces after having been discharged in violation of the NLRA, and who (the Board has held) may not receive back pay during the period of their incarceration or military service, because they are unavailable for work during that period and could not physically enter the labor market without breaking the law.[12] And because the record did not

---

1985) (no back pay for employee who removed herself from job market by entering law school full-time).

[12] See *Sure-Tan*, 467 U.S. at 903 (citing to NLRB's case handling manual, which discussed, where cited, grounds on which employees might be unavailable and therefore ineligible for back pay, including illness, attendance at school, confinement in institutions, and service in armed forces); 234 N.L.R.B. at 1193 nn.11 & 12 (ALJ's order in *Sure-Tan* denying back pay, relying on these analogies); see also *Lundy Packing Co.*, 286 N.L.R.B. 141, 163 (1987) (incarceration), enf'd, 856 F.2d 627 (4th Cir. 1988); *MSW Constr., Inc.*, 219 N.L.R.B. 1073, 1079 (1975) (same); *Gifford-Hill & Co., Inc.*, 188 N.L.R.B. 337, 338 (1971) (same); *Brown Truck & Trailer Mfg. Co.*, 106 N.L.R.B. 999, 1028 (1953) (same); *John David Brock*, 42 N.L.R.B. 457, 468-469 (1942) (induction).

By contrast, the Board has awarded back pay to discriminatees who lacked certain legal qualifications to obtain employment, but who were not physically barred from the labor market without legal authorization. See *Felbro*, 795 F.2d at 718 (discussing cases); see also *NLRB* v. *IBEW Local Union 112*, 992 F.2d 990, 995 (9th Cir. 1993) (permitting award of back pay to discriminatee who did not have journeyman electrician's license necessary to perform work); *NLRB* v. *Future Ambulette, Inc.*, 903 F.2d 140, 145 (2d Cir. 1990) (modifying Board's award of back pay to permit award to discriminatee whose driver's license was suspended, during periods in which other unlicensed drivers were also employed); *Justrite Mfg. Co.*, 238 N.L.R.B. 57, 67-68 (1978) (underage worker entitled to back pay); *Robinson Freight Lines*, 129 N.L.R.B. 1040, 1042, 1047-1048 (1960) (truck driver without valid driver's license awarded back pay up to date on which he was laid off by employer for that reason). But see *NLRB* v. *Browne*, 890 F.2d 605, 608-609 (2d Cir. 1989) (reversing Board award of back pay at "driver's rate" to discriminatee whose driver's license had been suspended).

show that those aliens were available for work in the United States for any period after their departure, there was no basis in the record for the court of appeals' speculation that they would have likely remained in Sure-Tan's employment for six more months, had the employer not reported their unlawful presence in the United States to the INS.

Thus, the principal thrust of the Court's ruling on back pay as a remedy in *Sure-Tan* was to set aside the speculative award ordered by the court of appeals as inconsistent with the proper standard governing judicial review of Board remedial orders. See *Sure-Tan*, 467 U.S. at 898 ("We find that the Court of Appeals exceeded its narrow scope of review in imposing both these modifications.") (referring to six months' back pay and various requirements governing the reinstatement offers). Indeed, the Court "generally approved the Board's original course of action" in that case, which was to order back pay, remitting the amount to be calculated at a compliance hearing, at which the employees' availability for work would be considered. See *id.* at 902. The Court did not have before it for review any remedial order of the Board in which *the Board*, taking into account the policies of both the NLRA and the INA, had determined that the discriminatees should receive the traditional compensatory remedy of back pay for a specific period, based on particularized evidence about the employee's employment history following his discharge.[13] Rather, the Court criticized the *court of appeals*, not the Board, for

[13] See *Sure-Tan*, 467 U.S. at 901 n.11 (noting that the Board had never before "attempted to impose a minimum backpay award that the employer must pay regardless of the actual evidence as to such issues as an employee's availability for work or his efforts to secure comparable interim employment"). Indeed, the ALJ in *Sure-Tan* had invited the Board to consider ordering a minimum period of back pay, even in the absence of evidence about the discriminatees' presence in the national labor market, see 234 N.L.R.B. at 1193, but the Board declined to take that course.

ordering back pay "without regard to the employees' actual economic losses or legal availability for work," characterizing the court of appeals' action as "plainly exceed[ing] its limited authority under the Act." *Id.* at 904-905.

The Court also recognized that, after the discriminatees left the United States, they might subsequently have become "available" for work by reentering the United States. See *Sure-Tan*, 467 U.S. at 903-904. To preclude the discriminatees in *Sure-Tan* from claiming that they had reestablished their "availability" for work by reentering the country (illegally) during the back pay period, and to encourage the discriminatees to reenter legally if they wished to render themselves "available" for work, the Court adopted the court of appeals' proviso that the discriminatees must be deemed "unavailable" for work "during any period when they were not lawfully entitled to be present and employed in the United States." *Id.* at 903.

Understood in its context, therefore, the Court's limitation of the back pay remedy available to the workers in *Sure-Tan* should not be understood as a blanket rule barring back pay for undocumented workers in all factual contexts.[14] Certainly the Court was not required in *Sure-Tan* to decide any such broad issue in order to resolve the case before it.

---

[14] Petitioner suggests (Br. 9) that, in his partial dissent in *Sure-Tan*, Justice Brennan "agreed" that the Court's decision in that case limiting back pay operates broadly to bar back pay for all undocumented workers. That suggestion is unpersuasive. While Justice Brennan expressed concern that, under the majority's decision, undocumented alien workers would be "effectively deprived of any remedy" (467 U.S. at 911), Justice Brennan did not address whether the Court's back pay proviso must necessarily be read as applying to undocumented workers who remain in the United States during the back pay period. In any event, "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." *United States* v. *Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974).

Rather, the Court was faced with a specific situation in which the discriminatees, having made themselves unavailable for work by leaving the United States labor market, could not reenter that labor market and become available for work again without either (a) receiving official authorization or (b) breaking the law (by reentering illegally). The Court's decision reflects a concern that a discriminatee who had left the United States should be encouraged to pursue the former, rather than the latter, route to reentering the labor market here.

The Board's limited award of back pay to Castro in this case accordingly does not conflict with *Sure-Tan*. Castro remained in the United States following his unlawful discharge by petitioner, and thus did not make himself unavailable for work by removing himself from the labor market. Awarding Castro limited back pay therefore would not promote his illegal reentry into the United States. Rather, Castro is more similarly situated to other workers who are legally ineligible for employment, such as underage workers or workers without necessary state licenses, but who nonetheless may receive back pay under Board and court precedent. See p. 21 note 12, *supra*. Nor is the factual basis for the back pay award speculative. The record in this case demonstrates that, absent his unlawful layoff on January 31, 1989, Castro would have continued working for petitioner until June 14, 1993, at which point the facts revealed by his testimony before the Board would have required petitioner to discharge him under IRCA. 8 U.S.C. 1324a(a)(2); see p. 41, *infra*.

This Court's own discussion of *Sure-Tan* also reveals that that decision does not flatly preclude all back pay for undocumented workers who have been discharged in violation of the NLRA. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984), decided only ten days after the decision in *Sure-Tan*, the Court summarized that decision as follows:

> [I]n *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.

468 U.S. at 1047-1048 n.4 (emphasis added). The *Lopez-Mendoza* Court's reference to the availability of "[r]etrospective sanctions" under *Sure-Tan*, as distinguished from the "prospective relief" of reinstatement, indicates that *Sure-Tan* does not categorically prohibit the Board from awarding back pay to undocumented aliens.[15]

2. As petitioner recognizes (Br. 12 & n.7), the court of appeals' reading of *Sure-Tan* in this case is consistent with that of the Second and Ninth Circuits, which likewise have read *Sure-Tan*'s restriction on back pay to apply only to undocumented discriminatees who have departed from the United States during the back pay period. See *NLRB* v. *A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50, 54 (2d Cir. 1997); *Local 512, Warehouse & Office Workers' Union* v. *NLRB* (*Felbro, Inc.*), 795 F.2d 705, 722 (9th Cir. 1986). Similarly, most courts that have examined the issue have held that

---

[15] Similarly, Judge Cudahy, who had written the Seventh Circuit's opinion in *Sure-Tan*, subsequently explained that the "not lawfully entitled to be present and employed in the United States" language first appeared in the Seventh Circuit's opinion, and was addressed only to aliens who had left the country. *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F.2d 1115, 1123-1124 (7th Cir. 1992) (Cudahy, J., dissenting).

Sure-Tan does not preclude an award of back pay under other employment-rights statutes, such as Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, to undocumented aliens who have remained in the United States.[16] In addition, many courts have ruled that undocu-

---

[16] See *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989) (pre-IRCA case holding that *Sure-Tan* does not preclude undocumented aliens who were subjected to various discriminatory practices from receiving back pay); *Rios* v. *Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (pre-IRCA Title VII case holding that *Sure-Tan* did not preclude back pay to undocumented alien members of class of black and Hispanic employees); *EEOC* v. *Tortilleria "La Mejor,"* 758 F. Supp. 585 (E.D. Cal. 1991) (holding that, after IRCA, undocumented aliens remain protected by Title VII); *Patel* v. *Quality Inn South*, 846 F.2d 700, 706 (11th Cir. 1988) (pre-IRCA case holding that undocumented aliens may recover unpaid back wages for violations of FLSA), cert. denied, 489 U.S. 1011 (1989); *In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (pre-IRCA case holding undocumented alien status irrelevant to coverage of FLSA); *Contreras* v. *Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053 (N.D. Cal. 1998) (undocumented alien may sue for compensatory and punitive damages under anti-retaliation provision of FLSA); *Alvarez* v. *Sanchez*, 482 N.Y.S.2d 184, 185 (App. Div. 1984) (pre-IRCA case holding undocumented alien may maintain action under FLSA). See also Equal Employment Opportunity Commission, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Oct. 26, 1999), *available at* <http://www.eeoc.gov/docs/undoc/html> (also concluding that *Sure-Tan* bars back pay for undocumented aliens "only where, as in *Sure-Tan*, the worker is unavailable for work by virtue of being out of the country"). Cf. *Bevles Co.* v. *Teamsters Local 986*, 791 F.2d 1391, 1393-1394 (9th Cir. 1986) (undocumented alien may recover under labor arbitration agreement), cert. denied, 484 U.S. 985 (1987). But see *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998) (en banc) (holding that, after IRCA, undocumented alien could not pursue claim of retaliatory failure to hire under Title VII), cert. denied, 525 U.S. 1142 (1999).

Some of those employment-rights statutes may raise additional reasons for awarding back pay that are not present in this case. For example,

mented aliens may recover lost wages in tort and contract actions. See *Felbro*, 795 F.2d at 718 n.12 (collecting cases).

Petitioner, however, urges the Court to adopt the contrary interpretation of *Sure-Tan* set forth in the majority opinion in *Del Rey Tortilleria, Inc.* v. *NLRB*, 976 F.2d 1115 (7th Cir. 1992), and in Judge Beezer's dissenting opinion in *Felbro*. Neither of those opinions, however, provides a persuasive reading of the *Sure-Tan* decision. In *Del Rey Tortilleria*, a majority of a panel of the Seventh Circuit interpreted *Sure-Tan*'s back pay limitation broadly to "bar[] undocumented aliens from receiving backpay." 976 F.2d at 1119. In reaching that conclusion, the *Del Rey Tortilleria* court relied in part on Judge Beezer's dissent in *Felbro* (as does petitioner). See *ibid.*[17] Judge Beezer argued that an undocumented worker "has not been harmed in a legal sense by the deprivation of employment to which he had no

---

under the minimum-wage and overtime provisions of the FLSA, 29 U.S.C. 206(a) and 207(a), and under the Equal Pay Act, 29 U.S.C. 206(d), when an employee sues to recover unpaid back wages, the employee is seeking compensation for work that was actually performed, not (as in this case) back pay for work that would have been performed had the employee not been unlawfully discharged. In addition, such FLSA and Equal Pay Act suits usually do not present questions of mitigation of damages, whereas an employee who has been discharged in violation of the NLRA and who seeks back pay through an NLRB award generally must show that he has attempted to mitigate his damages. See p. 10 note 7, *supra*.

[17] The panel in *Del Rey* also suggested that, if undocumented aliens could receive back pay as a remedy for a violation of their rights under the NLRA, they "would be rewarded by the NLRB for entering the United States illegally." 976 F.2d at 1119. Nowhere in *Sure-Tan*, however, did this Court explain the justification for its limitation on back pay in such terms. See 467 U.S. at 902-905. Indeed, that reasoning is in significant tension with this Court's conclusion in *Sure-Tan* that, notwithstanding their having illegally entered the United States, undocumented workers are entitled to the benefit of improved wages and working conditions (*i.e.*, the "rewards") that may flow from collective bargaining under the NLRA. See *id.* at 891-894.

entitlement," and therefore is not entitled to any back pay for a discharge in violation of the NLRA. *Felbro*, 795 F.2d at 725.

But in *Sure-Tan*, this Court *declined* to adopt the view that an undocumented alien worker cannot be "harmed in a legal sense" by a violation of the NLRA because he has no right to employment in the United States. To the contrary, the Court ruled in *Sure-Tan*, in agreement with the Board, that undocumented workers are "employees" within the coverage of the NLRA and thus are entitled to the Act's protection against discharge for engaging in protected union activity. See 467 U.S. at 891-894. The Court stressed that interpreting the NLRA to cover undocumented workers protects not only those individuals but also others who are covered by the NLRA. First, "[i]f undocumented alien employees were excluded 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." *Id.* at 892.[18] Second, including undocumented aliens within the coverage of the NLRA (and similar laws) ensures that employers do not obtain any financial or competitive advantage in hiring undocumented aliens at substandard wages and conditions of employment, rather than citizens and aliens authorized to work. See *id.* at 893; see also *Egbuna* v. *Time-Life Libraries, Inc.*, 153 F.3d 184,

[18] Indeed, if undocumented workers were not included within the coverage of the NLRA, they would likely be intimidated from reporting violations to the authorities, even if those violations affected other workers within the coverage of the Act. See *NLRB* v. *Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring) ("If the NLRA were inapplicable to workers who are illegal aliens, we would leave helpless the very persons who most need protection from exploitative employer practices[.]").

188 (4th Cir. 1998) (en banc) (Ervin, J., dissenting), cert. denied, 525 U.S. 1142 (1999).

In sum, the Board and the court of appeals correctly rejected petitioner's contention that *Sure-Tan* categorically prohibits the Board from awarding back pay in any circumstances to undocumented workers simply because of their undocumented status during the back pay period. Rather, the Board and the court properly read *Sure-Tan* to restrict back pay only for discriminatees who were not physically present in the United States during the back pay period. Because Castro was physically present in the United States during the back pay period, *Sure-Tan* did not preclude the Board from awarding him appropriately limited back pay.

B. The Board's Limited Back Pay Award In This Case Reasonably Accommodates The Policies Of The NLRA and IRCA.

Petitioner also contends (Br. 20-28) that, even if *Sure-Tan* does not preclude the Board from awarding any back pay to Castro, IRCA does, because IRCA barred Castro from obtaining employment in the United States. The Board's award of limited back pay to Castro, however, reasonably reconciles the remedial purposes of the NLRA with the objectives of IRCA.

1. The propriety of the Board's back pay order in this case is governed by three remedial principles. First, back pay is a fundamental aspect of the Board's authority to remedy violations of Section 8(a)(3). "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces." *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 197 (1941); see also *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952). Furthermore, Board back pay orders are not limited to the "correction of private injuries." *Phelps Dodge*, 313 U.S. at 193. An order of back pay also promotes "the

achievement and maintenance of workers' self-organization" (*ibid.*) by making all employees at a particular job site (whether or not they are the actual targets of unfair labor practices) "more confident in the exercise of their statutory rights." *Virginia Elec. & Power Corp.* v. *NLRB*, 319 U.S. 533, 541 (1943); see also *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 185 (1973) (back pay aids in the "prevention of a deterrent effect on the exercise of rights guaranteed employees by [Section] 7 of the Act"). Back pay thus deters employers from reaping a financial advantage from retaliatory discharges of union organizers.[19]

Second, even if an employee has been subjected to unlawful discrimination, the employee's own wrongdoing is relevant "[i]n determining appropriate remedial action." *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 361

---

[19] As amicus Equal Employment Advisory Council points out (Br. 15-16), the Board does not have authority under the NLRA to impose purely punitive sanctions such as fines. See *Republic Steel Co.* v. *NLRB*, 311 U.S. 7, 10 (1940). A back pay order is not punitive, however, merely because one of its functions is to deter employers from engaging in unfair labor practices in violation of the Act. Rather, in a situation like this case, where petitioner hired Castro without knowledge that Castro was an undocumented alien and then also discharged Castro without that knowledge, but with the purpose of retaliating against Castro's exercise of rights under the NLRA, an order of back pay, tied closely to the period that Castro would have worked had petitioner not violated Section 8(a)(3), serves the compensatory function of restoring "the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge*, 313 U.S. at 194. By contrast, one of the chief defects of the court of appeals' decision in *Sure-Tan* was that its award of back pay had no connection to any period that the undocumented aliens would in fact have worked had they not suffered discrimination, and therefore did not serve a compensatory function. See *Sure-Tan*, 467 U.S. at 900-901. In that situation, the court of appeals' order was arguably more similar to an impermissible fine for a violation of the NLRA. Cf. *id.* at 905 n.14 (declining to resolve whether court of appeals' minimum back pay order in that case was improperly punitive).

(1995) (decided under Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*). Evidence that an employee has engaged in misconduct sufficiently grave that the employer would be fully justified in discharging or refusing to hire the employee on that ground alone may preclude any reinstatement of the employee. Such misconduct may also terminate the employee's right to back pay as of the date that misconduct came to light, on the ground that the employer would have discharged the employee as of that date anyway. But the Board has also concluded that such misconduct will not necessarily deprive the employee of *all* entitlement to back pay for the period before evidence of the misconduct came to light. Rather, the Board has applied an after-acquired knowledge rule closely similar to that applied by this Court in *McKennon*: if 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 that the employer first acquired knowledge of the misconduct." *Marshall Durbin Poultry Co.*, 310 N.L.R.B. 68, 70 (1993) (limiting back pay of discriminatee who had engaged in workplace sexual harassment), enf'd in relevant part, 39 F.3d 1312 (5th Cir. 1994); *John Cuneo, Inc.*, 298 N.L.R.B. 856, 856-857 (1990) (limiting back pay of discriminatee who had made false statements on job application). Cf. *McKennon*, 513 U.S. at 362 (applying similar back pay limitation rule under ADEA).

The Board's after-acquired knowledge policy is based on a remedial judgment that, while it is appropriate for a discriminatee to bear the economic consequences of his misconduct, he is nonetheless entitled to limited compensatory relief, because "relieving [the employer] of *all* back pay liability, including that for the period when [the employer] had no knowledge of [the discriminatee's misconduct] and had no lawful reason to fire him, would provide an undue windfall for [the employer]." *John Cuneo, Inc.*, 298 N.L.R.B.

at 856 (emphasis added). This Court reached a similar judgment in *McKennon*. On one hand, the Court recognized that requiring reinstatement and continued back pay after the employer learned of the employee's serious misconduct would unduly infringe upon the employer's rights and prerogatives. 513 U.S. at 362. On the other hand, the Court made clear that "[a]n absolute rule barring any recovery of backpay * * * would undermine" the statutory objectives of preventing unlawful employment discrimination. *Ibid.*

Third, in fashioning a remedy, the Board "may [not] wholly ignore other and equally important Congressional objectives," for, "[f]requently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another." *Southern S.S. Co.* v. *NLRB*, 316 U.S. 31, 47 (1942). Thus, in a case like this one, involving remedies for violations against undocumented alien employees, the Board's order "is obliged to take into account * * * the objective of deterring unauthorized immigration that is embodied in the INA." *Sure-Tan*, 467 U.S. at 903.

2. The back pay order fashioned by the Board in this case is consistent with the remedial principles articulated above. First, the award furthers the compensatory goals of the NLRA by placing Castro, for an appropriately limited period of time, in the economic position he would have occupied had petitioner not violated his rights under the NLRA. See *J.H. Rutter-Rex Mfg. Co.*, 396 U.S. at 265 (back pay award proper where "designed to restore, so far as possible, the status quo that would have obtained but for the wrongful act").

Second, by terminating Castro's entitlement to back pay as of June 14, 1993, the Board's order is also consistent with NLRA remedial principles. On that date, petitioner learned that Castro had used false documents in applying for employment in May 1988, to establish that he was authorized to work in the United States. Pet. App. 79a-80a. The Board found that petitioner "would not have offered Castro initial

employment had it known of his unauthorized immigration status." *Id.* at 84a. The Board thus cut off Castro's entitlement to back pay as of June 14, 1993. That termination date is consistent with the remedial principles, recognized by this Court in *McKennon* and the Board in numerous cases, that a discriminatee must bear the economic consequences of his own employment-related misconduct, but that misconduct should not be seized upon to give the employer an "undue windfall" of relief from all monetary liability for its own violation of the NLRA. *John Cuneo, Inc.*, 298 N.L.R.B. at 856.

Third, the Board's order reasonably accommodates IRCA. As we have explained (see pp. 4-6, *supra*), IRCA generally makes it unlawful for an employer to hire or retain an individual knowing that he is an alien not authorized to be employed in the United States, or without complying with the "employment verification system" established by IRCA, which obligates each employer to examine specified kinds of documents to verify that a person whom it wishes to hire is not an "unauthorized alien." Petitioner, however, did not contravene these provisions of IRCA in its employment relationship with Castro. Petitioner did examine relevant documents and did not know that Castro lacked authorization to work in the United States either when it hired him or when it laid him off. See Pet. App. 84a-85a & n.11.[20] Accordingly, the Board's order recognizes that, at least as of the date that petitioner laid off Castro, petitioner could have

[20] Moreover, under 8 U.S.C. 1324a(a)(3), an employer that "establishes that it has complied in good faith with" the verification requirements of Section 1324a(b) "has established an affirmative defense" that the employer has not violated the statute's prohibition against knowingly hiring unauthorized aliens. The Board's findings in respect to petitioner's effort to verify whether Castro was authorized to work at the time of hire (see Pet. App. 84a-85a & n.11) are consistent with a conclusion that petitioner could have established that affirmative defense under IRCA.

continued to employ him for a limited period of time without violating IRCA.[21]

The Board's decision to cut off Castro's back pay award as of June 14, 1993 (but not before) based on his employment-related misconduct also reasonably accommodates IRCA. Once petitioner discovered Castro's unauthorized immigration status on June 14, 1993, it could not have continued to employ Castro after that date (had he not already been laid off in violation of the NLRA), because IRCA makes it unlawful for an employer "to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien." 8 U.S.C. 1324a(a)(2). But because petitioner had previously employed Castro, it could have rehired him at any time before that date without checking his documents (for example, to comply with the Board's order finding it in violation of the NLRA), as long as it did not otherwise become aware that Castro was an undocumented alien. See 8 C.F.R. 274a.2(b)(1)(viii)(A)(5). In these circumstances, by cutting off Castro's entitlement to back pay as of June 14, 1993, the Board reasonably accounted for

---

[21] We do not suggest that a Board order awarding back pay to an undocumented alien discharged in violation of Section 8(a)(3) would be invalid if the employer had initially hired or retained the discriminatee knowing that he was not authorized to work in the United States. In that situation, the Board has concluded that a limited award of back pay is appropriate. See pp. 6-8, *supra*; *A.P.R.A. Fuel*, 320 N.L.R.B. 408, 416 (1995), aff'd, 134 F.3d 50 (2d Cir. 1997); Pet. App. 83a. The Board has explained that that distinct back pay remedy is warranted to reduce the incentive for "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." *A.P.R.A. Fuel*, 320 N.L.R.B. at 415. Estoppel may also present another reason why an employer should not entirely escape back pay liability in such situations. In this case, the court of appeals expressly did not address the propriety of a back pay remedy in such situations (see Pet. App. 20a), and this Court need not reach that issue here.

the fact that, although Castro had sustained economic harm due to petitioner's NLRA violation up to that date, effective on that date Castro presumably would have suffered a termination of employment by petitioner once petitioner learned of his unauthorized status.

3. The availability of back pay for undocumented aliens who are discharged in violation of federal labor law but who remain in the United States also advances the underlying policies of IRCA. IRCA is based squarely on Congress's determination that "[e]mployment is the magnet that attracts aliens here illegally." See H.R. Rep. No. 682, 99th Cong., 2nd Sess. Pt. 1, at 46 (1986). Congress also concluded that "the hiring of undocumented workers adversely affects American employees because alien workers, out of desperation, will work in substandard conditions and for starvation wages." *A.P.R.A. Fuel*, 320 N.L.R.B. at 413-414. Congress therefore enacted penalties against employers who knowingly employ undocumented workers or fail to check their documentation in order to deter employers from hiring unauthorized aliens and, in turn, to deter aliens from entering illegally to seek employment.

The Board's provision for limited back pay to discriminatees such as Castro advances this deterrent objective of IRCA. If employers were absolved from their obligation to compensate undocumented aliens discharged in violation of federal labor laws, the deterrent effect of IRCA's penalties would be undermined by employers' monetary incentive to hire undocumented workers willing to work for lower wages and without labor protections, rather than citizens and aliens authorized for employment here. An employer might, for example, compare the monetary cost of compliance with IRCA's employment-verification system and the monetary effect of potential sanctions under IRCA with the savings of employing undocumented workers and the perceived benefits of union avoidance, and decide that it is worth the risk of

incurring IRCA's penalties to hire undocumented aliens. See *A.P.R.A. Fuel Oil*, 134 F.3d at 57. The availability of a limited back pay remedy ensures that employers will "realize[] that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers," and thus reduces "any incentive to hire such illegal aliens." *Sure-Tan*, 467 U.S. at 893.

Other provisions of IRCA reinforce the point that monetary remedies for undocumented aliens who have suffered violations of federal labor laws advance the deterrent purposes of IRCA. In Section 111(a)(1) of IRCA, Congress stated that one of the "essential elements of the program of immigration control established by this Act" is "an increase in the * * * enforcement activities" of "appropriate Federal agencies in order to prevent and deter the illegal entry of aliens into the United States." 100 Stat. 3381. To that end, in Section 111(d) of IRCA, Congress appropriated funds for "such sums as may be necessary to the Department of Labor for enforcement activities of the Wage and Hour Division and the Office of Federal Contract Compliance Programs [OFCCP] within the Employment Standards Administration of the Department in order to deter the employment of unauthorized aliens and remove the economic incentive for employers to exploit and use such aliens." 100 Stat. 3381.

Back pay is a conventional remedy available when the Wage and Hour Division of the Department of Labor enforces the FLSA and when OFCCP enforces programs prohibiting discrimination by federal contractors.[22] In providing

---

[22] See 29 U.S.C. 216(c) (unpaid minimum wages and overtime compensation); see also *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960) (back pay available when Department of Labor enforces the FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3)); *United States* v. *Whitney Nat'l Bank*, 671 F. Supp. 441 (E.D. La. 1987) (back pay available when OFCCP enforces programs prohibiting discrimination by federal contractors); *United States* v. *Duquesne Light Co.*, 423 F. Supp. 507 (W.D.

for increased enforcement of those provisions to deter employers from hiring undocumented aliens, Congress thus clearly anticipated that employers would be subject to monetary liability for back pay to undocumented alien workers. That result is inconsistent with any suggestion that IRCA catagorically limited the legal protections available to such workers under federal labor laws.[23]

4. Petitioner contends (Br. 20, 24) that the Board's limited back pay order in this case is inconsistent with IRCA's prohibition against an employer's knowingly hiring or continuing to employ an unauthorized alien. See 8 U.S.C. 1324a(a)(1) and (2). There is no merit to that assertion. Rather, as we have explained, during the back pay period defined by the Board (*i.e.*, January 31, 1989, through June 14, 1993), petitioner could have continued to employ Castro (had he not already been laid off in violation of the NLRA) without violating IRCA. Moreover, unlike a reinstatement order, the back pay award to Castro does not require peti-

---

Pa. 1976) (same); 41 C.F.R. 60-1.26(a)(2) (same). Congress likely had in mind back pay as the monetary sanction because civil penalties are not available when the Department of Labor enforces the FLSA's anti-retaliation provision or when OFCCP enforces anti-discrimination provisions. Civil penalties under the FLSA for minimum wage and overtime violations were not enacted until 1989, after IRCA. See Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 9, 103 Stat. 945.

[23] The Department of Labor's Employment Standards Administration and the INS have also recognized, in a memorandum of understanding concerning enforcement of labor-standards laws, that "vigorous targeted enforcement of labor standards can serve as a meaningful deterrent to illegal immigration" because "[i]t denies some of the business advantages that may be gained through the employment of highly vulnerable and exploitable workers at sub-standard wages and working conditions." See Memorandum of Understanding Between the Immigration and Naturalization Service, Department of Justice and the Employment Standards Administration, Department of Labor (Nov. 23, 1998), *available at* <http://www.dol.gov/dol/esa/public/whatsnew/whd/mou/nov98mou.html.>

tioner to hire Castro in contravention of IRCA; it only requires petitioner to compensate Castro for a period of employment that would not have violated IRCA. The back pay award therefore does not place petitioner in a position of conflicting obligations under two federal statutes.

Petitioner also maintains (Br. 20, 24, 27-28) that the Board's limited back pay order is inconsistent with IRCA's prohibition against an employee's misuse of identification documents to secure employment. See 18 U.S.C. 1546(a) and (b) (1994 & Supp. V 1999). That contention is unpersuasive. Although Congress chose, in Section 1546(b)(1) and (2), to criminalize the misuse of identification documents, it did not also make violators ineligible for back pay awards or other compensation flowing from employment secured by the misuse of such documents. And because Congress recognized that the availability of back pay to undocumented aliens *promotes* enforcement of the immigration laws (see pp. 36-37, *supra*), the Board therefore could reasonably decline to invoke the document-misuse provisions as a complete bar to any award of back pay to Castro.[24]

Petitioner's reliance on the criminal provisions of 18 U.S.C. 1546(b) to bar the Board's award of limited back pay to Castro also finds little support in this Court's decisions. The Court has concluded that the Board is not required to deny a remedy under the NLRA to a discriminatee who gives false testimony under oath before the agency. See

---

[24] Subsequent to IRCA, Congress revisited the issue of the misuse of identification documents by employees and enacted additional civil penalties. See Immigration Act of 1990, Pub. L. No. 101-649, § 544, 104 Stat. 5059-5061. Yet, as in IRCA, Congress, in the 1990 Act, did not provide any disqualification from entitlement to back pay awards for employees who misuse identification documents. See 8 U.S.C. 1324c(a) and (d)(3). The civil penalties enacted in the 1990 Act were not made retroactive, and therefore do not apply to Castro's misuse of false identification documents, which occurred in 1988.

ABF Freight Sys., Inc. v. *NLRB*, 510 U.S. 317, 322-325 (1994). Likewise, the Court has rejected the contention that, in a Title VII case, a court should enter judgment against a defendant employer solely because it has lied about its reason for the adverse employment action at issue. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 521 (1993) (explaining that "Title VII is not a cause of action for perjury; we have other civil and criminal remedies for that"). Accordingly, while Castro could have been prosecuted for his fraud under IRCA, it does not follow that the Board was required to deny a back pay remedy to Castro, and thereby relieve petitioner of the conventional monetary liability that flowed from its own unlawful conduct, namely, laying off an employee in violation of the NLRA.[25]

Moreover, as the court of appeals observed (Pet. App. 14a), the legislative history of IRCA confirms that Congress "did not intend the statute to limit the NLRA even indirectly." The relevant House committee report explains

---

[25] There is, accordingly, no merit to petitioner's contention (Br. 24) that the availability of back pay to undocumented aliens like Castro improperly rewards their use of fraudulent documents to gain employment. Congress has authorized substantial criminal and civil penalties for such misconduct; an alien who uses such false documents may be imprisoned for up to five years, see 18 U.S.C. 1546(b), may be subjected to civil penalties, see 8 U.S.C. 1324c(a)(4) and (d)(3), and may be deported as well, see 8 U.S.C. 1227(a)(3)(C)(i). Any alien who engages in such document fraud does so, therefore, at substantial peril to himself. Nevertheless, Congress did not bar all back pay for undocumented aliens, and indeed in IRCA it authorized increased enforcement of labor-standards laws, in recognition of the fact that such enforcement (including a potential monetary remedy for the benefit of undocumented aliens) also deters illegal immigration by reducing employers' economic incentive to hire undocumented aliens. See pp. 36-37, *supra*. Faced with competing considerations as to the optimal deterrence of illegal immigration, Congress simply did not preclude all undocumented aliens from receiving back pay, and to have done so might well have undermined enforcement of the Nation's immigration laws.

that no provision of IRCA should "be used to * * * limit the powers of federal or state labor relations boards * * * to remedy unfair practices committed against undocumented employees for * * * engaging in activities protected by existing law." H.R. Rep. No. 682, *supra*, Pt. 1, at 58. Although the committee report does not indicate the precise parameters of the remedy that Congress expected the Board to award undocumented workers victimized by NLRA violations, the legislative history yields no support for the proposition that Congress sought to combat illegal immigration by (as petitioner urges) denying remedies for labor law violations to undocumented workers.

5. Petitioner argues (Br. 25) that an award of back pay for undocumented aliens like Castro who remain in the United States after being illegally discharged encourages such aliens to extend their illegal stay. That contention, however, is based on the doubtful speculation that undocumented workers will consider the possibility of receiving back pay, perhaps after years of litigation, in deciding whether to remain in the United States or to return home after being discharged. In fact, such discharged undocumented workers are far more likely to focus on obtaining a new job immediately, if such employment is available. See *Patel* v. *Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (noting that "[i]t is the hope of getting a job—at any wage—that prompts most illegal aliens to cross our borders"). At any rate, such judgments about the likely effects of the Board's remedial orders are principally for the Board to make in determining how its remedial authority should be exercised. As this Court explained shortly after enactment of the NLRA:

> [Congress left] the adaptation of means to ends to the empiric process of administration [by the Board]. * * * Because the relation of remedy to policy is peculiarly a

> matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confine of law into the more spacious domain of policy. * * * [T]he power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

Phelps Dodge, 313 U.S. at 194.

There is also no merit to petitioner's claim (Br. 25) that, in awarding Castro limited back pay, the Board either "excus[ed] Castro's failure to mitigate his damages" or "sanction[ed] the perpetration of a fraud by Castro on yet another unsuspecting employer." The Board did not excuse any alleged "failure" by Castro to mitigate his loss of income after petitioner unlawfully laid him off. See generally *Nathanson*, 344 U.S. at 29 (in calculating net back pay, Board deducts "actual interim earnings"). Rather, the Board found (Pet. App. 85a-86a n.12) that Castro "satisfied his obligation to make reasonable efforts to find interim work following his unlawful layoff" by securing such jobs as a carpenter's helper and a gardener. Nor is there any evidentiary basis in the record for a conclusion that Castro tendered fraudulent identification documents in obtaining interim work. Petitioner adduced no such facts in the compliance proceeding before the Board. It may well be that the employers with which Castro secured interim employment either hired him without complying with the "employment verification system" set forth in 8 U.S.C. 1324a(b), or were not legally obligated to verify Castro's work authorization prior to hiring him.[26]

---

[26] An INS regulation provides that "employment" does not include "casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent." 8 C.F.R.

Finally, there is no merit to petitioner's suggestion (Br. 17) that issuance by the Board of a cease and desist order alone represents the only proper accommodation of the NLRA and IRCA in this case. As this Court has explained in the context of Title VII, "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). Rather, "[i]t is the reasonably certain prospect of a backpay award that provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices." *Id.* at 417-418 (internal quotation marks omitted).

The same reasoning holds true in the context of unfair labor practices under the NLRA. As this Court has recognized, a back pay order provides "more certain deterrence against unfair labor practices" than does a Board cease-and-desist order alone. *Sure- Tan*, 467 U.S. at 904 n.13. To be sure, as the Court also held in *Sure-Tan*, back pay is not available for undocumented aliens in some circumstances, just as it is not available in some circumstances for other employees who remove themselves from the labor market or are otherwise not physically capable of working legally in the United States. See pp. 20-22, *supra*. But it does not follow that back pay under the NLRA (or other federal labor laws) is *never* available for undocumented alien workers, and such a holding could impair the effective enforcement of both the Nation's labor and immigration laws. Neither *Sure-Tan* nor IRCA requires such a result.[27]

274a.1(h). An employer's obligation to verify an individual's authorization for "employment" does not extend to such casual work. See 8 C.F.R. 274a.2(b)(1)(i). Some of the work that Castro obtained after his layoff by petitioner could have been the kind of casual employment for which verification was not required (*e.g.*, his work as a gardener).

[27] In attempting to demonstrate that the Board's limited back pay order in this case is precluded by IRCA, petitioner relies (Br. 21-22) on the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

ARTHUR F. ROSENFELD
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

DECEMBER 2001

---

response of the government's attorney to a hypothetical question posed by a Member of the Court at oral argument in *Sure-Tan*, concerning the permissibility of a back pay award if Congress were to enact legislation making it illegal to hire an alien not lawfully present in the United States. That reliance is misplaced. A lawyer's response to a hypothetical question at oral argument concerning a law that had not yet been passed by Congress or interpreted by the Board is entitled to little weight as a gloss on a statute that was subsequently enacted. When, after Congress enacted IRCA, the Board did have occasion to consider the significance of IRCA for the appropriateness of back pay awards to undocumented aliens, the Board carefully examined the new legislation and determined that a such a back pay award would accommodate and, indeed, further, the purposes of IRCA. See pp. 6-8, *supra*.