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The Seventh Circuit Explains Why There Is No Harm in Exploiting Undocumented Workers: *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992)

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CASENOTE

THE SEVENTH CIRCUIT EXPLAINS WHY THERE IS NO HARM IN EXPLOITING UNDOCUMENTED WORKERS: *DEL REY TORTILLERIA, INC. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992)

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I. INTRODUCTION

In October 1982, the International Ladies Garment Workers Union initiated a successful organizing effort, responding to Del Rey Tortilleria, Inc. production and maintenance employees' desire to improve their working conditions.² Replying to an employee request for regularly scheduled breaks, a management supervisor sparked this organizing effort by calling the employees "a bunch of pigs" because, she said, they made a mess of the lunchroom.³ The National Labor Relations Board⁴ found numerous violations of the Act during the organizing effort of 1982, including other wrongful discharges. Another incident in which a manager told some of her employees "that no wetbacks were going to tell her what to do" demonstrated the company's anti-union animus because management used the perjorative reference for union adherents.⁵

On April 23, 1985, Del Rey Tortilleria, Inc. violated the National Labor Relations Act⁶ by unlawfully discharging Bernardo Bravo and Nicolas Paredes, undocumented Mexican nationals,⁷ for

1. Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union, 272 N.L.R.B. 1106, 1108 (1984). The bargaining unit included full-time and regular part-time production and maintenance employees, but excluded clerical employees, truck drivers, guards, and supervisors as defined in the National Labor Relations Act (NLRA). *Id.*

2. *See id.* at 1109-10.

3. *Id.* at 1109.

4. Congress created the National Labor Relations Board (Board) in 1935. NLRA, ch. 372, § 3, 49 Stat. 449, 451 (1935) (codified as amended at 29 U.S.C. § 153 (1988)).

5. 272 N.L.R.B. at 1115. The Administrative Law Judge (ALJ) considered the testimony of two employees who had been discharged because the company had accused them of drinking on the job. The company also told them that if they were not in the union they could continue working. They testified that they saw the confiscated beer bottle in the manager's office in a bag bearing the inscription "Union of the wetbacks." *Id.* at 1111.

6. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-87 (1988)).

7. NLRA, ch. 372 § 8(a)(1), (3), 49 Stat. 449, 452 (codified as amended at 29 U.S.C. § 158(a)(1) and (3) (1988)).

exercising their union rights.⁸ When the company fired Bernardo Bravo and Nicolas Paredes, the union filed an unfair labor practice complaint with the Board.⁹ This resulted in a stipulation agreement.¹⁰ The company agreed to reinstate and make whole Bravo and Paredes' lost wages, as a result of their terminations.¹¹ It conditioned its agreement on the holding of a formal hearing to determine those remedies.¹² At that hearing, before an Administrative Law Judge (ALJ), the company challenged the validity of the stipulation agreement.¹³ It argued that Bravo and Paredes were not entitled to reinstatement and back pay because they were undocumented aliens.¹⁴ However, the ALJ found the stipulation agree-

The family-owned corporation employed approximately 110 unskilled workers who were almost all Mexicans or Mexican-Americans, some of whom were undocumented aliens. See *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 272 N.L.R.B. 1106, 1109 (1984), *enforced by*, *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118 (7th Cir. 1986). Undocumented workers is the term used in this Casenote for foreign nationals working in the United States without legal authorization. Undocumented aliens, also called illegal aliens, refers to individuals present in the United States in violation of 8 U.S.C. § 1181 (1988).

8. By firing Bernardo Bravo and Nicolas Paredes for union activities, the company violated section 8(a)(1) and (3) of the NLRA. See *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216 (1991), *rev'd in part*, 976 F.2d 1115 (7th Cir. 1992). Section 8(a)(1) reads in the relevant part, that "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7[.]" and section 8(a)(3) prohibits employers from discriminatorily discharging employees because of their union activities. NLRA, ch. 372, § 8(a)(1), (3), 49 Stat. 449, 452 (codified as amended at 29 U.S.C. § 158 (a)(1), (3) (1988)).

9. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 216-17 (1991).

10. *Id.* On July 18, 1986 the Board issued its Decision and Order approving the Settlement Stipulation entered into on November 8, 1985 between the company, the union, and the General Counsel of the Board. *Id.* at 217. On September 23, 1986 the United States Court of Appeals for the Seventh Circuit entered an unpublished judgment enforcing in full the Board's Order. *Id.*

11. *Id.* at 216-17.

12. *Id.* at 217.

13. In its procedural challenge, the company claimed that it should not be bound by the stipulation agreement because the Board had failed to disclose General Counsel Memoranda OM 85-57 and OM 85-89, issued in July and October of 1985, which instructed the Board to deny remedial relief to discriminatees who were unable to show lawful presence in the United States during their back pay period. *Id.* at 217. In the earlier NLRB case, the Board ordered reinstatement and back pay to other unlawfully terminated undocumented workers. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 272 N.L.R.B. 1106, (1984), *enforced by*, *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118 (7th Cir. 1986). However, the company was able to procedurally delay compliance with those remedial orders because of OM 85-57 and OM 85-89, notwithstanding the Seventh Circuit's order of enforcement. See *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 217 (1991).

14. *Del Rey Tortilleria, Inc. and Local 76*, 302 N.L.R.B. at 217.

ment legally binding on the employer.¹⁵ Relying on an earlier Ninth Circuit decision in a similar case,¹⁶ the ALJ found that the discharged employees' undocumented status did not bar the traditional statutory relief of reinstatement and back pay.¹⁷ The Board affirmed the ALJ's findings and adopted her order, making the discriminatees whole for the entire back pay period.¹⁸

Del Rey Tortilleria petitioned the Seventh Circuit Court of Appeals for review of that order, and the NLRB cross-petitioned for enforcement.¹⁹ The United States Court of Appeals for the Seventh Circuit denied the NLRB's petition for enforcement of its order and granted the company's petition for review of that order. Bravo and Paredes could not receive back pay²⁰ for any time they were working in the United States because they were undocumented aliens.²¹ *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992).

The Seventh Circuit based its decision on *Sure-Tan, Inc. v. NLRB*.²² There, the Supreme Court held that undocumented aliens were employees within the meaning of the NLRA, but were not entitled to the NLRA's traditional remedy of back pay "during any period when they were not lawfully entitled to be present and employed in the United States."²³ According to the Seventh Circuit, the NLRA did not apply to Bravo and Paredes because, as undocumented aliens, they were not entitled to be present and em-

15. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 217-18 (1991). The back pay proceeding was only part of the agreement which in other respects benefitted the company. Other benefits included the dissolution of a U.S. District Court injunction pending against it and the avoidance of an admission of guilt. *Id.* at 218.

16. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

17. *Del Rey Tortilleria, Inc. and Local 76*, 302 N.L.R.B. at 218-20.

18. *Id.* at 216, 222.

19. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992).

20. On August 24, 1988, the company made a bona fide reinstatement offer thereby tolling the accrual of back pay and leaving the issue of reinstatement moot. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 221 (1991).

21. The company and the union stipulated at the back pay hearing that Bravo and Paredes were undocumented aliens. *Id.* at 218.

22. 467 U.S. 883 (1984). Unlike *Local 512* and this case, the discriminatees in *Sure-Tan* left the United States after their company had reported them to the Immigration and Naturalization Service (INS). Therefore, the *Sure-Tan* discriminatees were physically unavailable for their back pay hearing. *Id.* at 887-90.

23. *Id.* at 903.

ployed.²⁴ Yet, the Supreme Court had previously held in *Sure-Tan* that undocumented workers were employees under the Act.²⁵ Thus, the Seventh Circuit's reasoning in *Del Rey Tortilleria, Inc.* suggested that labor protective provisions of federal law were inapplicable to undocumented alien workers.

This Casenote examines that contradiction and the conflict created by the *Del Rey Tortilleria, Inc.* decision among the federal circuits. It argues that, unlike the Seventh Circuit's *Del Rey Tortilleria, Inc.* decision, the Ninth Circuit's decision in *Local 512*,²⁶ which interpreted *Sure-Tan* narrowly, better accomplished both the NLRA's goal of protecting the collective bargaining rights of American workers and the INA's²⁷ goal of controlling illegal immigration.

II. HISTORICAL BACKGROUND

A. *The Context of Illegal Immigration*

Illegal immigration is of substantial concern to the United States. Estimates are highly variable, but suggest that between two and twelve million immigrants work in this country illegally.²⁸ Los

24. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115 (7th Cir. 1992).

25. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 883.

26. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

27. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1988)).

28. Authorities agree that compiling accurate data is difficult. See JULIAN L. SIMON, *THE ECONOMIC CONSEQUENCES OF IMMIGRATION* (1989). "There seems to be a strong inverse relationship between the quality of the research and the size of the estimate." *Id.* at 279; see also Jorge A. Bustamante, *Undocumented Migration from Mexico to the United States: Preliminary Findings of the Zapata Canyon Project*, in *UNDOCUMENTED MIGRATION TO THE UNITED STATES, IRCA AND THE EXPERIENCE OF THE 1980s* 211 (Frank D. Bean et al. eds., 1990) (evaluating effects of Immigration Reform and Control Act of 1986 and its lack of effectiveness); Jeffrey S. Passel, *Undocumented Immigration*, in 487 *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 181, (Rita J. Simon ed., 1986). The high estimate of the INS figure of 12 million is fallaciously based on the numbers of illegal aliens apprehended. SIMON, *supra*, at 279. See IMMIGRATION AND NATURALIZATION SERVICE, U.S. DEP'T OF JUSTICE, 1991 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1992) [hereinafter 1991 STATISTICAL YEARBOOK]. "Apprehensions are for events, not individuals." *Id.* at 143. Census projections for the 1992 presidential election estimated almost three million undocumented aliens are in the United States. *Voting and Registration in the Election of November 1992 in U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, No. 466* (1993). The 1980 census estimated that two million aliens were undocumented. *Id.* However, the census data demonstrate that the number of undocumented aliens is not as large or as threatening as commonly feared. Courtenay Slater, *The Illegals*, *AM. DEMOGRAPHICS MAG.*, Jan. 1985, at 26. Other estimates opine the low range at

Angeles, alone, is believed to contain almost one million undocumented Mexican and Central American workers.²⁹ There, citizens hold undocumented workers responsible for taking jobs away from legal residents and citizens.³⁰ Depressed economic conditions in foreign countries, particularly Mexico³¹ where a large proportion of the population is unemployed,³² provide the impetus for many to seek economic refuge in the United States.³³ Whether illegal immi-

eight million. William F. Buckley Jr., *Paradox of Working Illegal Aliens*, *MIAMI HERALD*, Jan. 25, 1993, at A15; see also 131 CONG. REC. S7039 (daily ed. May 23, 1985) (statement of Sen. Simpson, introducing the Immigration Reform and Control Act of 1985). "Some authorities estimate the new annual inflow at between 250,000 and 500,000 persons." *Id.*

29. See John Greenwald, *The Price of Obeying the Law*, *TIME*, Feb. 1, 1993, at 35 (quoting Madeline Janis, Executive Director of the Central American Refugee Center); Slater, *supra* note 28, at 28 (between 1970 and 1980, half of the illegal immigrants entering California settled in Los Angeles County and greater than half of that number were Mexicans). But see SIMON, *supra* note 28, at 279-85 (summary of statistical methodology suggesting that the size of the Mexican population living illegally in the United States is smaller than popular estimates suggest). Calculation of Mexican immigration is largely offset by a considerable movement in the opposite direction where most illegal Mexican nationals return to Mexico. *Id.* at 280-81.

30. This perception is strongest during economic downturns. See Robert Reinhold, *Fueled by Radio and TV, Outcry Became Uproar*, *N.Y. TIMES*, Jan. 23, 1993 (nat'l ed.), at 9 (discussing public fury over Zöe Baird's nomination as Attorney General and her hiring of illegal aliens as household help). The Supreme Court agrees with this perception:

Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on sub-standard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.

De Canas v. Bica, 424 U.S. 351, 356-57 (1976). But see Passel, *supra* note 28, at 195 (in Los Angeles study no evidence found to support proposition that undocumented workers were taking jobs away from groups most affected by their competition).

31. The INS apprehended 1.2 million aliens in 1991 of whom 94.5% were Mexican. 1991 STATISTICAL YEARBOOK, *supra* note 28, at 143. "Approximately 90% of the illegal aliens entering this country come from Mexico." 124 CONG. REC. 28,586 (1978) (statement of Sen. Huddleston). See *Transcript of the Reagan-Mondale Debate on Foreign Policy*, *N.Y. TIMES*, Oct. 22, 1984, at B4. President Reagan, in a campaign debate with Democratic Presidential Candidate Walter Mondale, said that "as long as [Latin American countries] have an economy that leaves so many people in dire poverty and unemployment, they are going to seek that employment across our borders. . . . [T]heir population is increasing and they don't have an economy that can absorb them and provide the jobs." *Id.*

32. See generally U.S. IMMIGRATION IN THE 1980S: REAPPRAISAL AND REFORM, (David E. Simcox ed., 1988) [hereinafter IMMIGRATION IN THE 1980S]. After the 1982 Mexican economic collapse, unemployment and underemployment affected 50% of the Mexican labor force. *Id.* at 23. See generally David E. Simcox, *Mexico's Dilemma: Finding a Million Jobs a Year*, in IMMIGRATION IN THE 1980S, *supra* at 201. A brochure for a *maquiladora* (light assembly plant) in Tijuana, which assembles computer components, touts Mexico for its extreme labor savings. The company pays its skilled workers \$1.40 an hour. Tim Golden, *After the Deluge, Life in Tijuana is Grimmer*, *N.Y. TIMES*, Feb. 1, 1993 (nat'l ed.), at A1.

33. See IMMIGRATION IN THE 1980S, *supra* note 32 (discussing economic and other fac-

gration causes substantial economic displacement of American workers,³⁴ contributes disproportionately to the total U.S. population growth with its accompanying strain on society,³⁵ or contributes in a positive way to the U.S. economy,³⁶ are issues with which Congress has long-grappled.

B. Congressional Efforts to Control Illegal Immigration

Congress first attempted to restrict immigration with the Immigration and Naturalization Act of 1875.³⁷ In 1885, Congress initiated regulation of immigrant labor in the Alien Contract Labor Act.³⁸ Between 1820 and 1880, more than ten million immigrants arrived in the United States.³⁹ In 1952 Congress consolidated the immigration laws by passing the Immigration and Nationality Act (INA).⁴⁰

Employers have historically had an incentive⁴¹ to hire illegal

tors driving immigration); see also HOUSE SELECT COMM. ON POPULATION, 95TH CONG., 2D SESS., *LEGAL AND ILLEGAL IMMIGRATION TO THE UNITED STATES* 26-29 (Comm. Print 1978), microformed on CIS No. 78-H962-17 (Congressional Info. Serv.); 124 CONG. REC. 13,286 (1978) (statement of Rep. Sawyer) (work in the United States is a "magnet" that attracts aliens because job opportunities in this country are so much better than in illegal aliens' homelands); L. Tracy Harris, Note, *Conflict or Double Deterrence? FLSA Protection of Illegal Aliens and the Immigration Reform and Control Act*, 72 MINN. L. REV. 900, 923 n.110 (1988).

34. For a discussion of the anti-immigration organizations, Federation for Immigration Reform (FAIR), Zero Population Growth (ZPG), and The Environmental Fund (TEF) which voice the theme that the United States is being "overwhelmed" by illegal Mexican immigrants and the "loss of control of our borders," see SIMON, *supra* note 28, at 277-306.

35. But see Slater, *supra* note 28, at 29 (arguing that undocumented workers pay more in taxes than they claim in social benefits).

36. See generally SIMON, *supra* note 28, at 345 (arguing that the overall effect of undocumented workers is positive); Bustamante, *supra* note 28 (proposing that undocumented immigration does more good than harm).

37. Immigration and Naturalization Act, ch. 141, 18 Stat. 477 (1875), repealed by Act of Oct. 20, 1974, Pub. L. No. 93-461, 88 Stat. 1387.

38. The Contract Labor Act of 1885 voided all contracts to work in the United States made with aliens abroad. Act of Feb. 26, 1885, ch. 164, § 2, 23 Stat. 332 (repealed 1952).

39. See H.R. REP. No. 1365, 82d Cong., 2d Sess., 11 (1952), reprinted in 1952 U.S.C.A.N. 1653, 1659; 1991 STATISTICAL YEARBOOK, *supra* note 28, at 27.

40. Pub. L. No. 820-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1988)).

41. See Christine N. O'Brien, *Reinstatement and Back Pay for Undocumented Workers to Remedy Employer Unfair Labor Practices*, 40 LAB. L.J. 208 (1989). "[I]f an employer does not expect to be equally penalized for unfair labor practices against undocumented aliens, this creates an economic incentive to prefer their hire over legally documented employees who can recover back pay." *Id.* at 212. Employers have other reasons to prefer undocumented workers. See Deborah Sontag, *Increasingly, 2-Career Family Means Illegal Immigrant Help*, N.Y. TIMES, Jan. 24, 1993 (nat'l ed.), at 1, 13. A woman seeking a newly

aliens. Illegal aliens have traditionally worked for lower wages without asserting the labor protective provisions of federal law.⁴² Thus, by enacting subsequent legislation, Congress expressed a clear intention to further the policy of controlling illegal immigration through vigorous enforcement of the labor protective provisions in federal law, thereby reducing the incentive to hire undocumented workers.⁴³ Congress addressed the incentive to hire illegal aliens through the Immigration Reform and Control Act⁴⁴ which

arrived, illegal immigrant to care for her newborn triplets stated that "I want someone who cannot leave the country, who doesn't know anyone in New York, *who basically does not have a life*, . . . I want someone who is completely dependent on me and loyal to my family." (emphasis added).

42. See generally Buckley, *supra* note 28, at A15. "Illegals show up with a different attitude toward work. They do not have available to them the welfare alternative. That is why while the national rate of unemployed is 7 percent, among illegals, it is probably nearer zero percent." *Id.* See generally *Immigration Reform and Control Act of 1982: Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 606-07 (1982), microformed on CIS Sup. Docs. No. Y 4J89/1:9/40 (U.S. Gov't Printing Office). The United Fresh Fruit & Vegetable Association stated that "[i]t has been demonstrated . . . that there are not enough domestic workers willing, able, qualified and available to work in agriculture. Domestic labor sources have not and will not provide sufficiently dependable and qualified workers to meet the needs of the fresh fruit and vegetable industry." *Id.* at 606-07.

43. See H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 58 (1986) (Report of Committee on the Judiciary), reprinted in 1986 U.S.C.A.N. 5662, microformed on CIS No. 86-H523-25 (Congressional Info. Serv.):

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 [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*], 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.

Id.; see also H.R. REP. No. 682, 99th Cong. 2d Sess., pt. 2, at 8-9 (1986) (Report of House Education and Labor Committee).

44. See *Immigration Control and Legalization Amendments: Hearings on H.R. 3080 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 56 (1985), microformed on CIS Sup. Docs. No. Y 4J89/1:9/28 (U.S. Gov't Printing Office) (testimony of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO). "It is our firm belief [that employers] want [illegal aliens] now because they are exploitable." *Id.* at 64. "[A]ll too frequently the reality is that U.S. employers intentionally hire illegal aliens thereby depriving citizens and lawful aliens of employment." *Id.* at 32 (statement of Alan C. Nelson, Commissioner, INS).

expressly proscribed the hiring of undocumented aliens.⁴⁵ Congress attacked the primary cause of illegal immigration, the search for jobs, by undermining the incentive to hire undocumented workers.⁴⁶ Thus, applying the NLRA's labor protective provisions and subjecting employers to back pay liability for retaliatory discharges will, logically, decrease employers' incentive to hire undocumented workers.⁴⁷

C. *Sure-Tan: NLRA Protection for Undocumented Workers*

In 1984, prior to the IRCA's enactment, the Supreme Court addressed the issue of the rights of undocumented workers under the NLRA.⁴⁸ Those workers had not remained in the United States following a discriminatory discharge.⁴⁹ The Supreme Court in *Sure-Tan* reversed the Seventh Circuit's modification⁵⁰ of an NLRB order.⁵¹ Like the Seventh Circuit, the Supreme Court held that undocumented aliens were "employees" for purposes of the NLRA.⁵² However, the Court reversed the Seventh Circuit's remedial holding of a minimum back pay award of six months.⁵³ The Court stated that, "in computing back pay, 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."⁵⁴

The *Sure-Tan* discriminatees were five Mexican nationals who had voted for a union during a Board supervised election on December 10, 1976. Their employer⁵⁵ had alerted the INS in retalia-

45. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 8 U.S.C.) (amending the Immigration and Nationality Act (INA) codified in 8 U.S.C. §§ 1101-1525 (1982)) [hereinafter IRCA].

46. Economic disparities between the United States and other countries will continue to draw undocumented workers to jobs in the United States. Slater, *supra* note 28, at 29.

47. See Local 512, Warehouse and Office Workers Union v. NLRB, 795 F.2d 705 (9th Cir. 1986).

48. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

49. *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982), *rev'd*, 467 U.S. 883 (1984) (holding that six months minimum back pay better effectuates policies of the NLRA).

50. *Id.*

51. *Sure-Tan, Inc. and Chicago Leather Workers Union, Local 43L*, 234 N.L.R.B. 1187 (1978).

52. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 883, 891-94.

53. *Id.*

54. *Id.* at 903.

55. The Board overruled the employer's objections and certified the Chicago Leather Workers Union, Local 431, Amalgamated Meatcutters and Butcher Workmen of North America, as the collective-bargaining representative on January 19, 1977. *Id.* at 886.

tion for their union support.⁵⁶ They accepted voluntary departure as an alternative to deportation, following a raid and arrest by the INS for being in the United States without visas or immigration papers authorizing them to work.⁵⁷

The Board upheld the union's unfair labor practices charges and ordered the traditional remedy of reinstatement with back pay.⁵⁸ It conditioned their remedy upon customary compliance proceedings to determine the employees' availability for work without explicit regard to the employees' immigration status.⁵⁹

On appeal the Seventh Circuit had modified the Board's order by conditioning reinstatement on the employees' legal presence in the United States.⁶⁰ The court ordered that the reinstatement offer be left open for four years to allow a reasonable time for their legal readmittance.⁶¹ It also ordered that the back pay period be tolled for the time the discriminatees were unavailable for lawful employment in the United States.⁶² However, in recognition of circumstances of the discharged employees and the objectives of the NLRA, the court suggested that the Board award a six-month back pay minimum, which the Board accepted.⁶³

On appeal, the Supreme Court agreed that the employer constructively discharged their employees.⁶⁴ The Court held that the NLRA applied to unfair labor practices committed against undocumented workers. Nevertheless, the Court reversed the Seventh Circuit's remedial order which had recognized the NLRA's objectives.⁶⁵ The Supreme Court reasoned that the NLRA's protection for undocumented workers was consistent with the NLRA's purpose of protecting collective bargaining.⁶⁶ It cited previous decisions which addressed the depressing effect of substandard wages

56. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 886-87 (1984).

57. *Id.*

58. *Id.*

59. *Id.* at 889. Two members of the Board dissented to the denial of the General Counsel's motion, arguing that failure to make reinstatement conditional on legal presence would encourage illegal reentry. See *Sure-Tan, Inc. and Chicago Leather Workers Union, Local 431*, 246 N.L.R.B. 788 (1979).

60. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 889-90.

61. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 889-90 (1984); see *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982).

62. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 886-87.

63. *Id.* at 890.

64. *Id.* at 894-95.

65. *Id.* at 890, 894.

66. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

of a "subclass of workers" on the wages and working conditions of both citizens and legal residents, and on the unity of all employees in effective concerted activities.⁶⁷ The Court saw no conflict between the NLRA's application to undocumented workers and the Immigration and Nationality Act.⁶⁸ It observed that protecting jobs for United States citizens was one of the primary reasons for restricting immigration.⁶⁹ Thus, the NLRA's application, the court reasoned, would eliminate the incentive to hire employees not subject to fair terms of employment,⁷⁰ reduce demand for undocumented workers, and diminish the pull of illegal immigration.⁷¹

The Supreme Court then held that the Seventh Circuit erred in modifying the Board's original order by providing an "irreducible minimum of six months back pay."⁷² The Court stated that a back pay remedy must redress actual, not "speculative," losses, take into account the circumstances of the individual employees, and address the employee's responsibility to mitigate damages and deduct interim earnings.⁷³ It criticized the estimated award because (1) the evidence was insufficient to establish the time the discriminatees might have been able to work before being arrested by the INS, and (2) their employer lacked the opportunity to provide mitigating evidence.⁷⁴

The Court approved the Board's original remedy of reinstatement.

67. *Id.*; see *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

68. The Court stated that "for whatever reason, Congress has not adopted provisions in the INA making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization." *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 892-93.

69. *Id.* at 893.

70. *Id.*

71. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893-94 (1984). The Court observed that enforcement of the NLRA in this regard was clearly reconcilable with the current immigration laws:

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. If an employer realizes that there will be no advantage under the NLRA in preferring illegal aliens to legal resident workers, any incentive to hire such illegal aliens is correspondingly lessened. In turn, if the demand for undocumented aliens declines, there may then be fewer incentives for aliens themselves to enter in violation of the federal immigration laws.

Id.

72. *Id.* at 898 (footnote omitted).

73. *Id.* at 900-01.

74. *Id.* at 901 n.11.

ment and back pay, viewing compliance proceedings as the means of tailoring the remedy to suit the individual circumstances of each discriminatory discharge.⁷⁵ Like the Seventh Circuit, the Court also recognized that the compliance proceedings had to be predicated on the employees' legal readmittance.⁷⁶ The Court reminded the Board that it was obliged to apply the NLRA in a manner which avoided conflict with another "equally important Congressional objective,"⁷⁷ the INA's purpose of deterring unauthorized immigration.⁷⁸

The Court then issued its declaration regarding back pay. This declaration would become the Seventh Circuit's touchstone for denying back pay to the *Del Rey* discriminatees. "Similarly, in computing back pay, the employees must be deemed 'unavailable' for work (and the accrual of back pay therefore tolled) during any period when they were not *lawfully entitled to be present and employed in the United States*."⁷⁹ The Supreme Court stressed that, with the exception of the minimum back pay award, the Seventh Circuit must predicate the uniform requirement of computing back pay upon "lawful[] entitle[ment] to be present and employed in the United States."⁸⁰ While it shared the Seventh Circuit's uncertainty over whether the discriminatees could lawfully return to establish their entitlements at compliance proceedings, the Court said that only congressional action could remedy such NLRA deficiency.⁸¹

The Court concluded that the Seventh Circuit had exceeded its authority by ordering the Board to impose a minimum back pay award without calculating the employees' actual economic losses and legal availability for work.⁸² It remanded the case for the issu-

75. *Id.* at 902.

76. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-03 (1984).

77. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (Board obliged to accommodate other congressional objectives).

78. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 903. Citing its decision in *Southern S.S. Co. v. NLRB*, the *Sure-Tan* Court said that the Board was required to take into account the equally important congressional purposes of deterring illegal immigration to avoid a potential conflict with the INA. *Id.*

79. *Id.* (emphasis added); *see also Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 903 (citing *Southern S.S. Co. v. NLRB*, 316 U.S. at 47)).

80. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 903 n.12 (citing *NLRB v. Sure-Tan, Inc.*, 672 F.2d 592, 606 (7th Cir. 1982)).

81. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984).

82. *Id.* at 904, 906.

ance of an appropriate remedial order consistent with its opinion.⁸³ But the meaning of the so-called plain language—"unavailable for work"—remained unanswered until *Del Rey Tortilleria*.⁸⁴

III. *DEL REY TORTILLERIA, INC. v. NLRB*: THE MEANING OF "UNAVAILABLE FOR WORK"

A. *Facts and Procedural History*

In November 1982, Del Rey Tortilleria, Inc.⁸⁵ threatened to report its undocumented employees to the INS to discourage a union-organizing effort at its plants.⁸⁶ In addition to generally intimidating, coercing, and firing employees for their union activities, the company's threats had often related to the undocumented status of the union supporters.⁸⁷ When the union sent its notice to the company demanding recognition, the company retaliated.⁸⁸ It posted a notice in Spanish informing the employees that, when collecting their paychecks, they would have to present two forms of identification, such as a birth certificate and a social security card.⁸⁹ A manager also told employees that they would need their "mica"⁹⁰ because "if the employees wanted a union, they would have to do everything legally."⁹¹ When one employee, who evi-

83. *Id.* at 883.

84. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992).

85. *Del Rey Tortilleria, Inc.* is a family-owned corporation located in the southwest section of Chicago. It employs, almost exclusively, Mexican-Americans or undocumented Mexicans and has manufactured and sold tortillas and other Mexican food for the past 39 years. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 272 N.L.R.B. 1106, 1109 (1984).

86. *Id.* at 1112.

87. *Id.* at 1116. The Board held that the company violated section 8(a)(3) of the NLRA by discriminatorily discharging Everardo Chavez, Antonio Paniagua, and Enelida Diaz because of their union activities. *Id.* In addition, the company violated section 8(a)(1) of the NLRA by promising employees increases in wages in return for renouncing the union, threatening to lay off or discharge employees in reprisal for union activities, and coercively interrogating employees concerning their and other employees' union activities. *Id.* The Board also held that conditioning the reinstatement of discharged employees upon their abandonment of union activities, threatening to report employees to immigration authorities, and threatening to summon the police to the homes of employees in order to discourage their union participation were violations of section 8(a)(1). *Id.*

88. *Id.* at 1110.

89. *Id.*

90. A "mica" is the green card issued by the INS, indicating that the holder has been lawfully admitted to the United States for permanent residence. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 272 N.L.R.B. 1106, 1110 (1984).

91. *Id.*

dently did not have a "mica," demanded his paycheck, he was told there would be no more work for him.⁹²

That same manager interrogated an employee about the identities of the workers who had signed union authorization cards.⁹³ During that interrogation, the manager showed the employee a newspaper article concerning people organizing a union who had been arrested by immigration authorities, and said she also could contact the Immigration Service concerning the unionization efforts at her plant.⁹⁴

Del Rey's vice-president and principal operating officer, Refugio Martinez, was away in Mexico when the union organizing campaign began.⁹⁵ On his return, he warned employees that if they did not abandon the union he would report them to the immigration authorities and replace them with other workers.⁹⁶ In fact, thirteen days before the union representation election, the INS did raid one of the company's plants arresting eighteen employees. Three employees left the country under voluntary deportation.⁹⁷

Notwithstanding the company's intimidation, the union's organizing efforts succeeded.⁹⁸ The Board certified the union as the exclusive bargaining agent of the production and maintenance employees.⁹⁹ It also ruled in the union's favor on the many unfair labor practice charges and ordered the company to cease and desist from its illegal conduct.¹⁰⁰ However, the company refused to recognize and bargain with the union.¹⁰¹

92. *Id.*

93. *Id.* at 1117.

94. *Id.* at 1112.

95. Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union, 272 N.L.R.B. 1106, 1112 (1984).

96. *Id.* at 1109, 1112.

97. *Id.* at 1112.

98. See NLRB v. Del Rey Tortilleria, Inc., 823 F.2d 1135 (7th Cir. 1987). Thirty-eight workers voted for the union, two for another union, and 23 voted no union. *Id.* at 1136. The company challenged 27 votes, and after a NLRB hearing, the Board resolved 15 votes in favor of the union, leaving 12 challenged votes which were not enough to affect the election results. *Id.*

99. *Id.* at 1108.

100. Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union, 272 N.L.R.B. 1106, 1116 (1984). On the Application for Enforcement, NLRB v. Del Rey Tortilleria, Inc., 787 F.2d 1118 (7th Cir. 1986), the Seventh Circuit noted that the Board had found fifteen acts of company interference with the organizational rights of the employees. 787 F.2d at 1122.

101. Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union, 275 N.L.R.B. 1486, 1487-88 (1985).

After considerable procedural delay, the Board petitioned the Seventh Circuit for enforcement.¹⁰² In holding that the Board's findings were supported by substantial evidence, the court noted that "[t]his case presents a classic case of anti-union behavior by a company."¹⁰³

Almost three and a half years and numerous cease and desist orders later, the employees fired as a result of their union membership were still not reinstated.¹⁰⁴ The company continued to flout the law with its illegal conduct and ignored the Seventh Circuit's enforcement of the Board's cease and desist orders.

Against this backdrop, the company once again violated the NLRA by discharging Bernardo Bravo and Nicolas Paredez in 1985.¹⁰⁵ The controversy that reached the Seventh Circuit,¹⁰⁶ however, did not involve the violations of the cease and desist orders because the company agreed to a settlement stipulation¹⁰⁷ on November 8, 1985, thus avoiding any admission of guilt.¹⁰⁸ The Board approved this stipulation on July 18, 1986, and the Seventh Circuit enforced it on September 23, 1986.¹⁰⁹ It ordered the company to offer reinstatement, making Bravo and Paredez whole for losses due to their termination, and to provide for resolution over any

102. NLRB v. Del Rey Tortilleria, Inc. 787 F.2d 1118 (7th Cir. 1986).

103. *Id.* at 1123.

104. Despite the Board's findings and the court orders, the company was ultimately able to avoid reinstating and making whole these discriminatees who had been unlawfully discharged in 1982. *Id.* See *supra* note 13. Del Rey insisted that the Board follow guidelines in OM 85-57 and OM 85-89, and as a result the discriminatees were denied reinstatement and back pay. Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union, 302 N.L.R.B. 216, 217 (1991) (company insistence that same procedure be followed denied because guidelines did not apply where stipulation provided for formal hearing). *Id.* at 218 n.7. Those guidelines were subsequently withdrawn. *Id.*

105. Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union, 302 N.L.R.B. 216 (1991); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115 (7th Cir. 1992).

106. Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d at 1115.

107. Del Rey Tortilleria, Inc. and Local 76, 302 N.L.R.B. at 216. The stipulation agreement included two other unlawfully discharged employees, Roberto Marcos and Felix Hernandez, but because they failed to appear at the backpay hearing and were unavailable for examination, the Board held the company not liable for the remedial relief otherwise due them. *Id.* at 216 n.3.

108. The company was able to avoid an admission of guilt to "numerous allegations of unlawful threats, interrogation, surveillance and promises of benefits, in addition to the wrongful discharges . . .," to avoid trial, and a federal district court injunction pending against it by agreeing to the settlement stipulation. Del Rey Tortilleria, Inc. and Local 76, 302 N.L.R.B. at 220. The Board considered that the settlement agreement treated Bravo and Paredez as discriminatees notwithstanding the non-admission clause. *Id.* at 220 n.15.

109. *Id.*

remedial controversy at a formal back pay proceeding before the Board.¹¹⁰ Thus, the only issues remaining for the Seventh Circuit's review were the Board's rulings on Bravo and Paredes's remedies.¹¹¹

B. *The Seventh Circuit's Analysis*

The Seventh Circuit held in *Del Rey Tortilleria, Inc. v. NLRB*¹¹² that Bravo and Paredes were not entitled to back pay¹¹³ because the Board had stipulated that, during their employment, they were undocumented aliens.¹¹⁴ Denying enforcement of the Board's order,¹¹⁵ the court agreed with the company that the order was inconsistent with *Sure-Tan, Inc. v. NLRB*.¹¹⁶

1. The Seventh Circuit's Interpretation of *Sure-Tan*

The Seventh Circuit's analysis centered on *Sure-Tan*. The court began by stressing that the correct reading of the *Sure-Tan* opinion would be dispositive.¹¹⁷ First, the court summarized its interpretation of the Board's decision.¹¹⁸ The Board, relying on the Ninth Circuit's interpretation of *Sure-Tan* in an earlier case,¹¹⁹ narrowly construed *Sure-Tan*'s remedial holding to deny back pay only to those aliens not physically present in the United States and unable to legally re-enter during the back pay period.¹²⁰

110. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216 (1991).

111. *Id.*

112. 976 F.2d 1115 (7th Cir. 1992).

113. *Id.* at 1123.

114. The court referred to the hearing before the administrative law judge. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. at 218. There, the parties stipulated that Bravo and Paredes were undocumented aliens during their employment and that they had applied for legalization under the Immigration Reform and Control Act of 1986. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1117 (citing *Del Rey Tortilleria, Inc. and Local 76*, 302 N.L.R.B. at 218). Bravo submitted a copy of an INS employment authorization card issued on July 21, 1988 that authorized him to work in the United States until January 20, 1989, and Paredes submitted a temporary resident card issued on January 26, 1988 that granted him temporary resident status under IRCA § 245A until August 23, 1990. *Id.* at 1117 n.2.

115. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1117.

116. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

117. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1118 (7th Cir. 1992).

118. *Id.* at 1117.

119. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

120. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers*

The Board held that the employer had the burden to prove a worker's illegal presence with a final INS deportation order.¹²¹ The court read the Board's decision to mean that undocumented workers could qualify for the Board's traditional remedies "unless the employer could prove their illegal presence by means of a final deportation order,"—proof which *Del Rey* never provided.¹²² Nevertheless, the employer successfully argued that, as a matter of law, Bravo and Paredez were entitled to no back pay because they were undocumented aliens.¹²³ Thus, *Del Rey's* broad construction of *Sure-Tan* persuaded the Seventh Circuit.¹²⁴

The Seventh Circuit in *Del Rey* first justified its decision to deny back pay to Bravo and Paredez by relying on a questionable interpretation of the requirements for discriminatees' legal readmittance and lawful presence in the United States.¹²⁵ For the Seventh Circuit, the Supreme Court's phrases, "*lawfully available for employment*" and "*lawfully entitled to be present and employed*" were controlling.¹²⁶ *Sure-Tan*, the court said, stood for the proposition that, because the INA proscribed illegal immigration, the NLRB could not circumvent the INA's purpose by "reward[ing] [undocumented aliens] . . . for entering the United States illegally."¹²⁷

2. The Seventh Circuit's Reliance on *Local 512's* Dissent

Second, the court justified¹²⁸ its denial of back pay to Bravo and Paredez on Judge Beezer's dissent in *Local 512*.¹²⁹ The court

Union, 302 N.L.R.B. 216, 219 (1991). In her decision, adopted by the Board, the administrative law judge said "because the issue was not before it, the Court did not expressly address the question here in dispute of whether workers who remain in this country and have not been subject to deportation proceedings are ineligible for back pay and reinstatement by virtue of their undocumented status." *Id.*

121. *Id.*

122. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1117 (7th Cir. 1992). This was the Seventh Circuit's reading of the second part of the ALJ's holding (adopted by the Board). *Id.* However, the ALJ stated: "[t]herefore, to conclude that Bravo and Paredez are eligible for reinstatement and backpay *until* the INS issues a final deportation order, furthers national labor policy while accommodating the purposes of the INA." *Del Rey Tortilleria, Inc. and Local 76*, 302 N.L.R.B. at 220 (emphasis added).

123. *Id.*

124. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1115.

125. *Id.* at 1119 (citing *Sure-Tan v. NLRB*, 467 U.S. 883, 902-03 (1984)).

126. *Id.* at 1119 (quoting *Sure-Tan, Inc. v. NLRB* at 903, 904) (emphasis added)).

127. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992).

128. *See id.*

129. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 722 (9th

reasoned that, because the make-whole provisions of the NLRA were solely remedial, those provisions necessarily applied to only those employees who had suffered a cognizable harm.¹³⁰ Undocumented workers who were, by definition, in the country illegally suffered no legal harm when unlawfully discharged from employment to which they had no right in the first instance.¹³¹ Therefore, Bravo and Páredez were not entitled to back pay because, as undocumented workers, their discharge from employment did not constitute a legal harm.¹³²

3. The Seventh Circuit's Response to the Board's Three-Tier Decision

The Seventh Circuit rebutted the Board's argument,¹³³ relying in part on footnote eleven of *Sure-Tan*,¹³⁴ that an undocumented worker was ineligible for back pay only when physically outside the United States.¹³⁵ The court explained that footnote eleven did not limit the *Sure-Tan* holding strictly to the facts.¹³⁶ Rather, footnote eleven was an additional criticism of its own recommendation for a six-month back pay minimum award because there was no evidence showing how long the discriminatees might have continued working before apprehension by the INS absent the unlawful discharges.¹³⁷ Additionally, the estimated award would have denied the employer its opportunity to provide mitigating evidence.¹³⁸ In any event, the court said, the "plain language" of the *Sure-Tan* decision denied back pay to undocumented workers not "lawfully

Cir. 1986) (Beezer, J., dissenting).

130. *Id.* at 725.

131. *Id.* at 725-26.

132. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992).

133. The court pointed out that the Board's position of awarding backpay to undocumented employees had changed from the argument it advanced in *Local 512*. *Id.* at 1119 n.4. See *supra* note 13 (re General Counsel's memoranda).

134. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

135. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1119-21. The Board had partially based this argument on footnote eleven of the *Sure-Tan* opinion. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 219 (1991). In relevant part, footnote 11 said that, "[i]n the instant case, the Court of Appeals 'estimated' an appropriate period of back pay 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." *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 901 n.11.

136. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119-20 (7th Cir. 1992).

137. *Id.* at 1119-20.

138. *Id.*

entitled to be present and employed in the United States."¹³⁹

Justice Brennan dissented in *Sure-Tan* because he said the effect of the opinion would be to increase the incentive to hire undocumented workers by relieving the employer of back pay liability.¹⁴⁰ The Seventh Circuit understood Justice Brennan's criticism to refer to the denial of back pay for all undocumented workers in a broad sense.¹⁴¹ Thus, the Seventh Circuit decided that its own interpretation of the *Sure-Tan* majority opinion also agreed with Justice Brennan's analysis.¹⁴²

Additionally, the Seventh Circuit responded to the union's¹⁴³ reliance on *INS v. Lopez-Mendoza*.¹⁴⁴ In *Lopez-Mendoza* the Supreme Court distinguished retrospective sanctions against an employer—sanctions permitted within *Sure-Tan*'s remedial holding—from prospective relief of reinstatement.¹⁴⁵ The Seventh Circuit pointed out that, in light of the Supreme Court's failure to specifically mention back pay and in light of the general language of *Sure-Tan*, the Court could not have meant to include back pay.¹⁴⁶ Therefore, no interpretation of *Lopez-Mendoza* would support the union's argument, relying on *Sure-Tan*, that only the physical unavailability of an employee tolled back pay.¹⁴⁷

Further the Seventh Circuit declined to follow the Ninth Circuit's decision in *Local 512, Warehouse and Office Workers Union v. NLRB*,¹⁴⁸ which permitted back pay relief for unlawfully dis-

139. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1119-20 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984)) (emphasis added).

140. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 912 (Brennan, J., dissenting).

141. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120 (7th Cir. 1992).

142. *Id.*

143. Local 76, affiliated with the International Ladies Garment Workers Union, intervened in *Del Rey Tortilleria* as Intervenor-Respondent and Intervenor-Cross-Petitioner. See *Del Rey Tortilleria, Inc. v. NLRB*, 967 F.2d 1115, 1119 (7th Cir. 1992).

144. 468 U.S. 1032 (1984) (holding that a deportation proceeding is a civil action to determine eligibility to remain, and its purpose is not to bring criminal sanctions, but to end continuing violation of immigration laws where exclusionary rule would not apply).

145. *Id.*

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.

Id. at 1047 n.4.

146. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1120.

147. *Id.* at 1120.

148. 795 F.2d 705 (9th Cir. 1986).

charged, undocumented workers who stayed in the United States.¹⁴⁹ The Seventh Circuit dismissed the argument that denial of back pay would encourage employers, incurring no back pay liability, to continue to violate the NLRA.¹⁵⁰ The reasoning of *Local 512* and Justice Brennan's dissent in *Sure-Tan* were indistinguishable.¹⁵¹

Last, the court rejected the Board's final argument that IRCA's legislative history supported its interpretation of *Sure-Tan*.¹⁵² The court reasoned that the legislative history demonstrated Congress' intention not to diminish or to undermine existing remedies for unfair labor practices against undocumented employees "for those periods [only] when they [were] lawfully entitled to be present and employed in the United States."¹⁵³ Thus, Congress did not intend, the court stated, to expand the scope of the term "employee" because, as the Supreme Court observed in *Sure-Tan*,¹⁵⁴ the existing interpretation protected lawful residents from employment competition of illegal aliens.¹⁵⁵

Specifically referring to the Committee Report, the court explained that the history merely demonstrated congressional preference for the preservation of existing law.¹⁵⁶ Thus, the Report merely supported *Sure-Tan*'s general proposition that undocumented workers were employees for purposes of the NLRA.¹⁵⁷ The Report did not disapprove of *Sure-Tan*'s remedial holding which, under the court's reading, provided back pay only for those periods when undocumented aliens were "lawfully entitled to be present and employed in the United States."¹⁵⁸

Further, IRCA did not affect the rights of Bravo and Paredes because it was enacted long after the termination of their employment.¹⁵⁹ The court stressed that its decision to deny back pay to

149. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1120-21.

150. *Id.* at 1120.

151. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120 (7th Cir. 1992).

152. *Id.* at 1121; H.R. REP. No. 682, *supra* note 43.

153. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1121.

154. 467 U.S. 883, 893 (1984).

155. *Id.* (citing H.R. REP. No. 1,000, 99th Cong. 2d Sess. 58 (1986)). However, the Seventh Circuit citation is incorrect. The correct citation is H.R. REP. No. 682, 99th Cong., 2d Sess., pt. 1, at 58 (1986), *reprinted in* 1986 U.S.C.A.N. 5662, *microformed on* CIS No. 86-H523-25 (Congressional Info. Serv.). See *supra* note 43.

156. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1121 (7th Cir. 1992).

157. *Id.*

158. *Id.*

159. *Id.* at 1121 n.6.

Bravo and Paredes, as a matter of immigration law, was limited to those discharges of undocumented aliens preceding IRCA's passage.¹⁶⁰ It explained that section 274A,¹⁶¹ proscribing the employment of undocumented workers, prevented the Board from awarding back pay to undocumented workers wrongfully discharged after IRCA's enactment.¹⁶² Thus, under no circumstance could Bravo and Paredes obtain relief.

According to the court, the Board concluded that undocumented workers were eligible for reinstatement¹⁶³ and back pay unless the INS issued a final deportation order.¹⁶⁴ The employer bore the burden of producing that evidence.¹⁶⁵ Where no determination had been made regarding the necessary evidence on the requisite party to show lawful entitlement to be present and employed in the United States, the Board reasoned that only an INS final determination produced by the party seeking to avoid the Board's traditional remedies sufficed to extinguish undocumented workers' rights.¹⁶⁶

This position,¹⁶⁷ the Seventh Circuit concluded, was inconsistent with *Sure-Tan* for two reasons.¹⁶⁸ First, the Seventh Circuit reasoned that, by virtue of the uncertainty of the *Sure-Tan* discriminatees' lawful re-entry to establish their employment entitlement at compliance hearings,¹⁶⁹ the burden of production was, by implication, on those discriminatees.¹⁷⁰ Second, because the *Sure-Tan* discriminatees agreed to voluntarily leave the United States, rather than involuntarily under a final deportation order, the Board's standard inappropriately entitled them to back pay.¹⁷¹ The court stated that such a standard would encourage employers to

160. *Id.* at 1122.

161. Codified at 8 U.S.C. § 1324a(a) (1988).

162. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 (7th Cir. 1992).

163. The issue of reinstatement was not before the court. *See supra* notes 106-10 and accompanying text.

164. *See supra* note 110 and accompanying text.

165. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1122.

166. *See Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 219 (1991).

167. The court may not have needed to deal with this question because the Board had stipulated to Bravo's and Paredes's undocumented status which, according to the court, disposed of the issue under the immigration laws. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1123 (7th Cir. 1992).

168. *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1122.

169. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 (1984).

170. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1122.

171. *Id.*

seek final deportation orders to avoid back pay liability.¹⁷² In the alternative, the Seventh Circuit requirements that discriminatees establish at a compliance hearing their lawful entitlement to be present in the United States, with documentation for the Board's evaluation, were not unduly burdensome.¹⁷³ They were not unduly burdensome because such requirements were equivalent to those which IRCA¹⁷⁴ currently imposed on employers and which the Social Security Administration required of alien applicants.¹⁷⁵

The court concluded by repeating its holding: "[b]ecause the Board stipulated that Bravo and Paredes were undocumented aliens during their employment with the Company, they were not lawfully entitled to be present and employed in the United States during most of the back pay period."¹⁷⁶ Thus they were not entitled to the traditional remedy of back pay.¹⁷⁷

IV. ANALYSIS

A. *The "Plain Language" of Sure-Tan Remains Less-Than-Plain*

The Seventh Circuit held that *Sure-Tan's*¹⁷⁸ plain language

172. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122-23 (7th Cir. 1992).

173. *Id.* at 1123.

174. See 8 U.S.C. § 1324a(b) (1988).

175. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1123. See Social Security Administration Rule, 20 C.F.R. § 422.107 (1991) (requiring that an applicant for a social security number submit documentation establishing United States citizenship or alien status).

176. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1123. Presumably, had Bravo and Paredes established their authorization for employment pursuant to the IRCA provision for grandfathered workers before their employer offered them unconditional reinstatement. This could be the period the court intended. However, the court made clear that IRCA did not control. See *id.* at 1121 n.6; *supra* notes 159-62 and accompanying text.

177. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1123 (7th Cir. 1992).

178. For a discussion of *Sure-Tan*, see Mark A. Miele, Note, *Illegal Aliens and Workers' Compensation: The Aftermath of Sure-Tan and IRCA*, 7 HOFSTRA LAB. L.J. 393 (1990) (arguing that *Sure-Tan's* reasoning is defective and that illegal aliens should not be protected by federal labor laws and therefore are not entitled to workers' compensation benefits); R. Christian Hutson, Note, *Labor Law - Narrowly Interpreting Sure-Tan to Provide Traditional Labor Law Remedies to Undocumented Aliens Continually Present in the United States*: *Bevles Company, Inc. v. Teamsters, Local 986*, 791 F.2d 1391 (9th Cir. 1986), 20 VAND. J. TRANSNAT'L L. 161 (1987) (narrow reading of *Sure-Tan* may increase illegal immigration and IRCA's enactment could alter Court's definition of undocumented aliens as employees under the NLRA); Terry A. Bethel, *Recent Labor Law Decisions of the Supreme Court*, 45 MD. L. REV. 179 (1986) (arguing that *Sure-Tan* deprives undocumented employees of any effective remedy for unlawful discrimination and permits employers to violate the law); John W. Sagaser, Note, *Rights Without a Remedy - Illegal Aliens Under the National Labor Relations Act*: *Sure-Tan, Inc. and Surak Leather Company v. NLRB*, 27 B.C. L. REV.

extinguished Bravo and Paredes's claims to back pay entitlement.¹⁷⁹ Yet, contrary to the Seventh Circuit's position, the meaning of the plain language is unclear. *Sure-Tan* does not clarify whether alien discriminatees, having left the United States because of their employers' retaliatory reports to the INS, can ever establish claims for back pay. More specifically, *Sure-Tan* does not conclusively establish that undocumented workers who legally re-enter the United States and are lawfully present at the compliance hearing can or cannot obtain back pay for the period following their wrongful discharge.

Is the period to which *Sure-Tan* refers—the time “when [the undocumented workers] were not lawfully entitled to be present and employed”,¹⁸⁰ thereby tolling their back pay accrual—the time between their unlawful discharge and their legal re-entry, or the time between deportation and their legal readmittance? The effect of the *Sure-Tan* decision on undocumented workers who have never left the country after their employer's unlawful termination is conspicuously uncertain.

The Seventh Circuit held that, under the immigration laws, Bravo and Paredes could not receive back pay for any period during which they were illegally in the United States.¹⁸¹ Because the Board stipulated that they were undocumented during their employment with the company, they were not entitled to be employed “during most of the back pay period.”¹⁸² Yet, on remand, the court concluded that the discriminatees could legitimately claim back pay for any period for which they had obtained authorization to work in the United States.¹⁸³

The court broadly construed the already less-than-plain language of *Sure-Tan*, and further confused its language. Stating that Bravo and Paredes were not entitled to back pay during most of the back pay period, the court predicated its decision on the fact that Bravo and Paredes were undocumented during their employment.¹⁸⁴ Yet, the court did not explain what it meant by *most* of

407 (1986) (arguing that *Sure-Tan* represents a new, more intrusive standard of review and the narrower NLRB remedial scope is without justification).

179. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1119.

180. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984) (emphasis added).

181. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1121.

182. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1123 (7th Cir. 1992).

183. *Id.*

184. *Id.*

the back pay period. Because IRCA did not apply,¹⁸⁵ Bravo and Paredez's only avenue for authorization to be "present legally" was to leave the United States and re-enter legally. Surely, such a procedural absurdity was not required under *Sure-Tan*. Thus, *Del Rey* was wrongly decided, turning the *Sure-Tan* holding on its head.

Unquestionably, the *Sure-Tan* discriminatees were not entitled to back pay while they were in Mexico, unavailable for work and unable to re-enter the United States legally. And it was clear that the *Sure-Tan* discriminatees' entitlements depended on their legal re-entry.¹⁸⁶ Back pay accrual would have tolled while they were out of the United States, or if they re-entered illegally.¹⁸⁷ But this language, plain in its application to the *Sure-Tan* discriminatees, did not factually encompass the *Del Rey* discriminatees.

B. *Sure-Tan and the Conflict Among the Federal Circuits*

1. The Ninth Circuit

In an earlier decision, the Ninth Circuit held, in *Local 512, Warehouse and Office Workers Union v. NLRB*,¹⁸⁸ that the National Labor Relations Board had erroneously interpreted¹⁸⁹ that language to mean that an undocumented alien worker would never

185. *Id.* at 1123 n.6.

186. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903-04 (1984).

187. *Id.*

188. 795 F.2d 705 (9th Cir. 1986). For a discussion of *Local 512*, see Heather Day, Note, *Labor Law Protections for Undocumented Alien Workers*, *Local 512*, 795 F.2d 705 (9th Cir. 1986), 11 SUFFOLK TRANSNAT'L L.J. 149 (1987) (arguing that the Ninth Circuit's decision, based on a narrow interpretation of *Sure-Tan*, furthers the policy aims of both the NLRA and the INA by protecting undocumented victims of unfair labor practices which reduces employer incentives in their hire); Daniel R. Fjelstad, Note, *The National Labor Relations Act and Undocumented Workers: Local 512 v. NLRB After the Immigration Reform and Control Act of 1986*, 62 WASH. L. REV. 595 (1987) (arguing that *Local 512* reached the correct result and urging that the narrow interpretation of the NLRB's duty to accommodate IRCA furthers the objectives of the NLRA); David L. Ruediger, Note, *Awarding Backpay for Employer Unfair Labor Practices to Undocumented Workers Regardless of Legal Immigration Status: Local 512 Warehouse and Office Workers Union v. NLRB*, 29 B.C. L. REV. 118 (1987) (arguing that *Local 512* wrongly interpreted *Sure-Tan* and that it is unlikely that the decision will be followed by other circuits, but that decision is meritorious because it deters unfair labor practices and promotes collective bargaining by reducing the economic advantage that employers obtain by hiring undocumented workers).

189. See *Felbro, Inc. and Local 512, Warehouse and Office Workers Union*, 274 N.L.R.B. 1268, 1269 (1985), *enforcement granted in part and denied in part, sub nom, Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705 (9th Cir. 1986).

be entitled to back pay.¹⁹⁰ Instead, the Ninth Circuit narrowly construed *Sure-Tan* to bar only those undocumented workers who were unavailable for work during the back pay period because they were outside the United States without entry papers.¹⁹¹ This directly conflicts with the Seventh Circuit's broad reading in *Del Rey Tortilleria*.

In *Local 512*, the Ninth Circuit faced an issue identical to that in *Del Rey*. *Local 512* involved a back pay award for undocumented workers pursuant to the Board's finding that the workers' employer violated the NLRA by improperly laying off its workers and refusing to execute the collective bargaining agreement.¹⁹² Based on its reading of *Sure-Tan*, the Board conditioned its back pay remedy on the discriminatees' immigration status.¹⁹³ On appeal, the Ninth Circuit enforced the liability portion of the Board's order.¹⁹⁴ However, it held that the conditional back pay remedy was inconsistent with both the NLRA and the immigration laws, and remanded the remedial portion of the Board's order for modification.¹⁹⁵

The Ninth Circuit interpreted *Sure-Tan* to mean that, had the *Sure-Tan* discriminatees not left the United States, they would have been entitled to back pay, notwithstanding their undocumented status.¹⁹⁶ The Ninth Circuit focused on *Sure-Tan*'s issue: the speculative estimate of the six-month back pay award for discriminatees indefinitely unavailable for work. However, unlike the *Sure-Tan* employees, the *Local 512* discriminatees' lost wages could be calculated precisely.¹⁹⁷ The Ninth Circuit reminded the Board that the *Sure-Tan* Court never suggested that it was overruling well-established precedent which determined back pay eligibility according to a discriminatee's availability to work, rather than legal status.¹⁹⁸

190. *Local 512*, 795 F.2d at 716.

191. *Id.* at 722. See *infra* notes 214-57 and accompanying text for other federal circuit decisions also in conflict.

192. *Local 512*, 795 F.2d at 709.

193. *Id.* at 710.

194. *Local 512*, *Warehouse and Office Workers Union v. NLRB*, 795 F.2d 105, 710 (9th Cir. 1986).

195. *Id.* at 709.

196. *Id.* at 717.

197. *Id.*

198. *Id.* The court cited a number of administrative agency decisions supporting the proposition that back pay has been awarded irrespective of legal status. *Id.* at 718. See *NLRB v. Apollo Tire Co.*, 236 N.L.R.B. 1627, *enforced by*, 604 F.2d 1180 (9th Cir. 1979).

The Ninth Circuit proceeded to explain the strong policy supporting its conclusion that the Board's back pay remedy was inconsistent with goals of the NLRA.¹⁹⁹ When employers knew they would incur no back pay liability for violating the NLRA, their incentive to hire undocumented workers would increase.²⁰⁰ Hiring more undocumented workers would hurt the American worker and, as the Supreme Court pointed out in *Sure-Tan*,²⁰¹ collective bargaining as well.²⁰² The court stressed that applying the NLRA's labor protective provisions to undocumented workers and eliminating employers' incentives to employ them²⁰³ satisfied *Sure-Tan's* additional concerns of addressing the two major goals of the INA: preserving job opportunities for American workers and protection of American workers' wage rates and working conditions.²⁰⁴

(undocumented workers); *Amay's Bakery & Noodle Co.*, 227 N.L.R.B. 214 (1976) (undocumented workers); *Justrite Manufacturing Co.*, 238 N.L.R.B. 57 (1978) (underage worker); *New Foodland, Inc.*, 205 N.L.R.B. 418 (1973) (underage worker); *The Embers*, 157 N.L.R.B. 627 (1966), *enforced by*, 64 L.R.R.M. (BNA) 2681 (5th Cir. 1967) (underage worker); *Local 57, Int'l Union of Operating Engineers*, 108 N.L.R.B. 1225 (1954) (no valid state license); *Robinson Freight Lines, Inc.*, 129 N.L.R.B. 1040 (1960) (no valid truck driver's license).

In addition, the court cited federal and state judicial decisions supporting the proposition that undocumented workers are entitled to compensation for violations of the Fair Labor Standards Act. See *Brennan v. El San Trading Corp.*, 73 Lab. Cas. (CCH) ¶ 33,032 (W.D. Tex. 1973); *Alvarez v. Sanchez*, 105 A.D.2d 1114 (N.Y. App. Div. 1984). For cases supporting the proposition that undocumented workers are entitled to compensation for breach of contract, see *Gates v. Rivers Constr. Co.*, 515 P.2d 1020 (Alaska 1973); *Nizamud-dowlah v. Bengal Cabaret, Inc.*, 69 A.D.2d 875 (N.Y. 1979).

For cases supporting compensation for wages lost because of on-the-job injuries, see *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975). For cases supporting compensation for tort damages, see *Peterson v. Neme*, 281 S.E.2d 869 (Va. 1981); *Arteaga v. Literski*, 265 N.W.2d 148 (Wis. 1978); see also *Torres v. Sierra*, 553 P.2d 721 (N.M. Ct. App. 1976) (compensation for wrongful death); *Moreau v. Oppenheim*, 663 F.2d 1300 (5th Cir. 1981) (compensation for breach of a sale contract), *cert. denied*, 458 U.S. 1107 (1982). See generally *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal aliens entitled to broad range of constitutional protections); *Hurtado v. United States*, 410 U.S. 578 (1973) (illegal aliens entitled to full per diem expenses as witnesses in a trial); *United States v. Otherson*, 637 F.2d 1276 (9th Cir. 1980) (illegal aliens entitled to protection of civil rights laws), *cert. denied*, 454 U.S. 840 (1981); *Dermegedich v. Rank*, 151 Cal. App. 3d 848 (1984) (illegal aliens entitled to state health benefits); *Cabral v. State Board of Control*, 112 Cal. App. 3d 1012 (1980) (illegal aliens entitled to compensation under state crime victims' statute); *Ayala v. California Unemployment Ins. Appeals Bd.*, 54 Cal. App. 3d 676 (1976) (illegal aliens entitled to state disability benefits). *Local 512*, 795 F.2d at 718 n.12.

199. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 719 (9th Cir. 1986).

200. *Id.*

201. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892-93 (1984).

202. *Local 512*, 795 F.2d 719.

203. See *id.* at 720.

204. *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 893.

The court then explained that the Board should not engage in immigration law determinations at its compliance proceedings.²⁰⁵ The Board was neither trained nor authorized to administer the intricate, complex statutory and regulatory provisions of the INA.²⁰⁶ Thus, its determinations were not entitled to judicial deference.²⁰⁷ Moreover, the Board's lack of expertise in this area was aggravated by the reality that many circumstances, in fact, prevented deportation. As the Supreme Court noted in *Plyler v. Doe*,²⁰⁸ a person subject to deportation might never be deported.²⁰⁹ Last, the court pointed to significant procedural differences between NLRB compliance and INS deportation proceedings which raised due process concerns, particularly the paucity of procedural protections at Board hearings otherwise available at deportation proceedings.²¹⁰

In *Local 512*, the Ninth Circuit distinguished *Sure-Tan* as barring back pay only to "undocumented workers who were unavailable for work in the back pay period because they were outside the United States without entry papers."²¹¹ Thus, the Ninth Circuit applied *Sure-Tan*'s holding narrowly to the facts. By doing so, the Ninth Circuit furthered the NLRA's goal of protecting the collective bargaining rights of all workers while accommodating the INA's purpose of preventing the loss of American workers' jobs and protecting American workers' wage rates and working conditions.²¹²

The Ninth Circuit's decision was proper because it attacked the competitive advantage gained by hiring undocumented workers and discouraged illegal immigration as a consequence.²¹³ Moreover,

205. *Local 512, Warehouse and Office workers' Union v. NLRB*, 795 F.2d 705, 720-22 (9th Cir. 1986).

206. *Id.*

207. *Id.* At oral argument, the Board admitted it did not know how to handle the immigration law issues which would arise. *Id.* at 720. The court cited *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) (complexity of immigration laws likened to "King Minos' labyrinth in ancient Crete"). There are 33 different categories of persons prohibited entry into the United States and 52 categories of deportable persons. *Id.* at 721.

208. 457 U.S. 202, 226 (1982).

209. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 721 (9th Cir. 1986).

210. *Id.* at 722. The Board's determination of immigration status might be given preclusive effect which would raise serious due process objections to the compliance proceeding. *Id.*

211. *Id.*

212. *Id.* at 719-20.

213. *Id.*

it better served Congress' intent in the Immigration Reform and Control Act, the NLRA, and it was the more correct interpretation of *Sure-Tan*.

2. The Second Circuit

The Seventh Circuit's interpretation of *Sure-Tan* in *Del Rey* also conflicts with the Second Circuit Court of Appeals. In *Rios v. Enterprise Ass'n Steamfitters Local 638*,²¹⁴ the court agreed with the Ninth Circuit that undocumented workers remaining in the United States were eligible for back pay.²¹⁵ The court found that applying the NLRA's protections was consistent with *Sure-Tan*.²¹⁶ The Second Circuit, relying on the analogy between the NLRA and Title VII of the Civil Rights Act of 1964,²¹⁷ addressed issues similar to *Del Rey* in *Enterprise Ass'n Steamfitters Local 638*.²¹⁸ The Court of Appeals reversed and remanded the district court's dismissal of six back pay claims due to the claimants' alleged illegal immigration status.²¹⁹ The district court had held that the claimants were non-resident aliens, illegally in the United States and, therefore, ineligible for back pay even though none had ever been subject to deportation proceedings.²²⁰ The dispute revolved around the interpretation of *Sure-Tan*'s construction of the NLRA's back pay provision.²²¹ Because Title VII's back pay provision mirrored the back pay provision of the NLRA, the Second Circuit considered this to be relevant authority.²²²

The court first articulated its interpretation of *Sure-Tan*.²²³ *Sure-Tan*, the Second Circuit explained, held that the NLRA's labor protective provisions applied to illegal aliens²²⁴ and did not

214. 860 F.2d 1168 (2d Cir. 1988).

215. *Id.* at 1173.

216. *Id.*

217. 42 U.S.C. §§ 2000e-2000e-17 (1988).

218. *Enterprise Ass'n*, 860 F.2d at 1169-70. The Equal Employment Opportunity Commission brought a consolidated class action against Enterprise Steamfitters for a pattern and practice of discrimination against the members seeking admission into the union. *Id.*

219. *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1171 (2d Cir. 1988).

220. *Id.* at 1171-72.

221. *Id.* at 1172.

222. *Id.* (citing *Albemarle Paper Company v. Moody*, 422 U.S. 405, 419 (1975)).

223. *Id.* at 1172.

224. *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1172 (2d Cir. 1988). The court compared this holding of *Sure-Tan* with *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (Title VII protection from unlawful discrimination extends to aliens). *Id.*

conflict with the immigration laws.²²⁵ Because the *Sure-Tan* discriminatees left the United States immediately after the NLRA violation and the claimants ability to legally re-enter the country was uncertain, the Supreme Court conditioned any back pay relief on their legal re-entry.²²⁶ Thus, it deemed them unavailable for work, tolling the back pay "during any period when they were not lawfully entitled to be present and employed in the United States."²²⁷ According to the Second Circuit, the goal of deterring unauthorized immigration was responsible, at least in part, for *Sure-Tan's* remedial holding.²²⁸

The Second Circuit distinguished *Enterprise Ass'n* from *Sure-Tan*.²²⁹ First, the claimants, unlike those in *Sure-Tan*, never left the United States.²³⁰ Thus, there was no inducement for them to re-enter the country legally.²³¹ Because the claimants were available during the entire back-pay-order period, it was logically impossible, contrary to the defendant union's argument, for them to be "legally unavailable" for employment.²³² Like the Ninth Circuit, the Second Circuit concluded that undocumented workers who remained physically present in the United States were eligible for back pay from the time of the NLRA violation.²³³

The *Del Rey Tortilleria*²³⁴ court acknowledged but distinguished *Enterprise Ass'n*.²³⁵ The Seventh Circuit reasoned that *Enterprise Ass'n* was unlike *Del Rey Tortilleria* because the former concerned undocumented aliens' entitlements to back pay under Title VII, rather than back pay remedies under the NLRA.²³⁶ Yet, as the Second Circuit noted in *Enterprise Ass'n*, this was a distinction without a difference; the similarity between Title VII and the NLRA was, indeed, incisive. Thus, the Seventh Circuit took *Enterprise Ass'n*, applied a superficial, highly formal-

225. *Id.* The court recognized that immigration law had changed with the passage of IRCA but expressly withheld its opinion of the effect of IRCA on similar future claims, noting only that the new provision did not apply retroactively. *Id.* at 1172 n.2.

226. *Id.* at 1172-73 (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903-04 n.12 (1984)).

227. *Id.* (citing *Sure-Tan, Inc. v. NLRB* 467 U.S. at 903).

228. *Id.* at 1172.

229. *Rios v. Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168, 1173 (2d Cir. 1988).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 (7th Cir. 1992).

235. *Id.* at 1122 n.7.

236. *Id.*

istic analysis to distinguish a factually similar Eleventh Circuit case, and augmented the conflict among the circuits.²³⁷

3. The Eleventh Circuit

In *Patel v. Quality Inn South*,²³⁸ a Fair Labor Standards Act (FLSA)²³⁹ case, the Eleventh Circuit, like the Second Circuit, saw the FLSA's similarity with the NLRA.²⁴⁰ The Eleventh Circuit reasoned that courts frequently looked to decisions under the NLRA when determining the FLSA's coverage.²⁴¹ The court stated that *Sure-Tan's* analysis of the NLRA strongly suggested that Congress intended the FLSA to apply to undocumented workers.²⁴²

Patel involved an action brought under the wage and overtime provisions of the FLSA by an undocumented worker to recover unpaid back wages.²⁴³ The Eleventh Circuit overturned the lower court's decision, which had reasoned that providing the protections of the FLSA to undocumented aliens would undermine the policies of the INA, as amended by IRCA, by encouraging illegal immigration.²⁴⁴ In reversing, the Eleventh Circuit cited the FLSA's legislative history, its expansive definition of "employee," which included undocumented workers, and several Supreme Court decisions²⁴⁵ under the Act.²⁴⁶

237. *Id.*

238. 846 F.2d 700 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989). For discussion of *Patel* see Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After Sure-Tan, IRCA, and Patel*, 63 N.Y.U. L. Rev. 1342 (1988) (discussing the legal background of FLSA enforcement against employers of undocumented aliens and why enforcement of federal labor statutes does not encourage illegal immigration not adequately explained by the *Patel* decision); Harris, *supra* note 33 (discussing FLSA protection of illegal aliens after IRCA and arguing that continued application of FLSA does not conflict with immigration law).

239. 29 U.S.C. §§ 201-19 (1988).

240. *Patel*, 846 F.2d at 703.

241. *Id.*

242. *Id.*

243. *Patel v. Quality Inn South*, 846 F.2d 700, 703 (11th Cir. 1988).

244. *Id.* at 701.

245. The court cited *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), to demonstrate the Supreme Court's interpretation of the breadth of the FLSA. *Patel*, 846 F.2d at 702. Although it had never faced the specific issue of undocumented workers, the Court has consistently refused to exclude coverage to employees not within a specific exemption. *Id.* See *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490 (1945) (FLSA exemptions should be narrowly construed); *United States v. Rosenwasser*, 323 U.S. 360 (1945); *cf. Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27 (1987) (precluding expansion of FLSA's specific exemptions by implication).

246. *Patel*, 846 F.2d at 702-03.

The court rejected the defendant employer's argument that, under the recently enacted Immigration Reform and Control Act, undocumented aliens were no longer entitled to the FLSA's protections.²⁴⁷ Citing to IRCA's legislative history, the court countered that such history strongly and unequivocally suggested congressional belief in the need for continued protection of undocumented aliens.²⁴⁸ Further, the public policy purposes of applying the FLSA's protection to undocumented workers were consistent with IRCA's goal of eliminating employers' economic incentive to hire undocumented workers to reduce illegal immigration.²⁴⁹ The court reasoned that, unless the most attractive feature of hiring undocumented workers—their willingness to work for less than the minimum wage—were eliminated, employers might continue to find it economically worth risking violation of IRCA.²⁵⁰ Extending labor law protections to undocumented workers did not encourage illegal immigration because of those workers' motivation for coming to the United States—to find work at any wage, not to receive the protection of U.S. labor laws.²⁵¹ Thus, extending FLSA's protection to undocumented workers furthered the fundamental objectives of IRCA because it reduced the incentive to hire those workers and discouraged illegal immigration.²⁵²

The court then addressed the defendant employer's contention that, because the NLRA and FLSA were similar, the Supreme Court's decision in *Sure-Tan* prevented the award of back pay for "any period when [undocumented workers] were not lawfully enti-

247. *Id.* at 704.

248. *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988). The court cited to the House Education and Labor Committee Report:

[T]he committee does not intend that any provision of this Act would limit the powers of State or Federal labor standards agencies such as the . . . Wage and Hour Division of the Department of Labor . . . in conformity with existing law, to remedy unfair practices committed against undocumented employees for exercising their rights before such agencies or for engaging in activities protected by those agencies. To do otherwise would be counter-productive of our intent to limit the hiring of undocumented employees and the depressing effect on working conditions caused by their employment.

H.R. REP. NO. 682, 99th Cong., 2d Sess., pt.2, at 8-9 (1986), *reprinted in* 1986 U.S.C.A.N. 5758. Additionally, the court pointed out, Congress specifically authorized the appropriation of additional funds for increased FLSA enforcement in order to remove the incentive to hire and exploit undocumented workers. 846 F.2d at 704.

249. *Patel*, 846 F.2d at 704.

250. *Id.*

251. *Id.*

252. *Id.* at 704-05.

tled to be present and employed.”²⁵³ The Supreme Court’s resolution of the back pay issue in *Sure-Tan* did not control claims for unpaid wages under the FLSA because the *Patel* claimant was attempting to recover back pay for work he had already performed, not for being unlawfully deprived of a job.²⁵⁴ The Eleventh Circuit concluded that, because the FLSA did not exclude illegal alien employees, the undocumented worker in *Patel* was entitled to the back pay remedy—even if *Sure-Tan* precluded that very remedy under the NLRA.²⁵⁵

Though the Eleventh Circuit declined to join the inchoate fray between the Seventh and Ninth Circuits because, as the Seventh Circuit had said,²⁵⁶ the issue was decided under the FLSA and not the NLRA and was, therefore, distinguishable, it used the same public policy arguments as the Ninth Circuit to support its award of back pay to the undocumented worker in *Patel*.²⁵⁷

C. *The Del Rey Tortilleria Majority Failed to Consider the Impact of Their Decision on the American Worker*

Citing *Patel*, *Del Rey Tortilleria*’s forceful and cogent dissent used this same policy analysis.²⁵⁸ In the dissent’s view, denying the back pay remedy to undocumented workers undermined the NLRA policy objectives of deterring unfair labor practices and the remedial purposes of making discriminatees whole.²⁵⁹ As the *Patel* court had pointed out,²⁶⁰ Judge Cudahy further argued that such inconsistent standards produced bad immigration policy.²⁶¹ Workers crossed the border illegally, looking for jobs, not the protection of our labor laws.²⁶² Denying back pay to those who were desperate for work at low wages, willing to tolerate poor working conditions, made them more, rather than less, attractive to U.S. employers and augmented a competitive disadvantage for their American

253. *Patel v. Quality Inn South*, 846 F.2d 700, 705 (11th Cir. 1988) (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984)).

254. *Id.* at 705.

255. *Id.* at 705-06.

256. *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 n.7 (7th Cir. 1992).

257. *See Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 718, 719 (9th Cir. 1986).

258. *See Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1125 (Cudahy, J., dissenting).

259. *Id.*

260. *See Patel v. Quality Inn South*, 846 F.2d 700, 704-05 (11th Cir. 1988).

261. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1125 (7th Cir. 1992).

262. *Id.*

counterparts.²⁶³ Last, Judge Cudahy reminded the *Del Rey Tortilleria* majority that, in applying the NLRA to undocumented workers, the *Sure-Tan* Court expressed this very concern over a heightened competitive disadvantage for American workers and lawful residents caused by the exploitation of illegal alien employees.²⁶⁴ Congress echoed this same concern in its Committee Report that accompanied the Immigration Reform and Control Act of 1986 (IRCA).²⁶⁵

The *Del Rey Tortilleria* majority and the dissent in *Local 512* ignored entirely this potential harm to U.S. workers.²⁶⁶ The *Local 512* dissent, which the *Del Rey* majority cited approvingly, reasoned that *Sure-Tan* was premised on the absence of legal harm to the wrongfully discharged undocumented worker who had no legal right to employment.²⁶⁷

Yet, *Sure-Tan*'s holding that an undocumented worker was an employee for purposes of the NLRA clearly contradicts this premise. The Supreme Court in *Sure-Tan* stated that discriminatees were not entitled to back pay relief not because of the absence of legal harm. Rather, the Court predicated the denial of back pay relief on the simple fact that they were not legally available for work.²⁶⁸

The *Local 512* dissent misread *Sure-Tan* to mean that "the provisions of the NLRA apply to illegal alien 'employees' in general terms [but] . . . the individual remedies normally provided for violations may not be available."²⁶⁹ As the Board pointed out in *Del Rey Tortilleria*,²⁷⁰ individual back pay remedies were not available to any employee, irrespective of immigration status, who failed to make a good faith effort to obtain or retain interim em-

263. *Id.*

264. *Id.* (citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984)).

265. See H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 58 (1986) (Report of Committee on the Judiciary), reprinted in 1986 U.S.C.C.A.N. 5662, microformed on CIS No. 86-H523-25 (Congressional Info. Serv.). For the quoted text, see H.R. REP. NO. 682, *supra* note 43.

266. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1119 (7th Cir. 1992) (citing *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986) (Beezer, J., dissenting in part)).

267. *Id.* at 1119.

268. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. at 903.

269. *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986).

270. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216 (1991).

ployment or was unavailable for employment for any other reason.²⁷¹

Thus, not applying the labor protective provisions of the NLRA to undocumented workers effectively harmed American workers. As the Supreme Court recognized, "[i]f 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."²⁷²

D. The Del Rey Tortilleria Majority Misinterpreted the Board's Rationale for the Final Deportation Order

The Seventh Circuit also misconstrued the Board's reasoning for the final deportation order.²⁷³ Contrary to the Seventh Circuit, the Board did not say that, "unless" the employer could prove an undocumented worker's illegal presence by way of a final INS deportation order, the employee was entitled to back pay.²⁷⁴ In its decision, the Board concluded that Bravo and Paredes were eligible for reinstatement and back pay "until" the issuance of an INS final deportation order, furthering national labor policy while accommodating the objectives of the INA.²⁷⁵

The difference between "unless" and "until" involves much more than semantics. This is because, under the Seventh Circuit's reading, relying on "unless," that determination would apply retroactively to extinguish entirely the claim for back pay. The Board's interpretation, relying on "until," would toll the accrual of back pay at the time of the deportation order's issue. In short, the Seventh Circuit's reading of the Board's reasoning would condition

271. *Id.* at 221 (citing Lundy Packing Co. and Local 525, Meat, Food and Allied Workers Union, 286 N.L.R.B. 141 (1987); J.H. Rutter-Rex Mfg. Co., Inc. and Amalgamated Clothing Workers of America, 158 N.L.R.B. 1414, 1447 (1966); Mastro Plastics Corp. and Local 3127, United Bhd. of Carpenters and Joiners of America, 136 N.L.R.B. 1342, 1347 (1962) enforced by., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966)).

272. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

273. See O'Brien, *supra* note 41, at 214-15 (Board correct to require INS determination before precluding traditional remedies).

274. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1117 (7th Cir. 1992).

275. *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 220 (1991). The Board was concerned with the complexities of the immigration laws.

any and all back pay upon an employer's failure to prove illegal presence while the Board's actual reasoning would presume back pay eligibility and condition its amount upon the time at which the employer proved illegal presence.

Thus, the Second Circuit's interpretation is significant because the Court unwittingly predicated its decision on a wholly inaccurate and inappropriate reading of the law. Moreover, the Board's interpretation is preferable because to hold otherwise would conflict with the Board's own express goal of furthering national labor policy. A contrary interpretation would also encourage employers to do precisely what the Seventh Circuit feared—to seek final deportation orders to avoid their back pay liability.²⁷⁶

E. The Del Rey Tortilleria Decision Frustrates the Goals of IRCA

Additionally, the Seventh Circuit's analysis of IRCA is incorrect and frustrates Congress' most fundamental reasons for enacting that legislation.²⁷⁷ The Seventh Circuit stated that its holding applied only to discriminatory discharges of undocumented workers occurring before the enactment of IRCA.²⁷⁸

The Second Circuit's flawed reasoning will apply prospectively and will misdirect that circuit's lower courts. This is because, contrary to the *Del Rey* majority, section 274A,²⁷⁹ which proscribes the employment of undocumented workers, does not "clearly bar[]

276. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1122-23.

277. For commentary on IRCA see Nancy S. Cowen, *The Employer's Dilemma Under IRCA: Is It Possible to Comply with I-9 Requirements without Discriminating?*, 6 GEO. IMMIGR. L.J. 285 (1992) (examining results of employer sanctions decisions in the context of anti-discrimination provisions of federal law); Charles E. Mitchell, *Illegal Aliens, Employment Discrimination, and the 1986 Immigration Reform and Control Act*, 40 LAB. L.J., 177 (1989) (reviewing recent court cases relating to the Act's anti-discrimination provisions enforced by the EEOC); Robin Alexander, *The Right of Undocumented Workers to Reinstatement and Back Pay in Light of Sure-Tan, Felbro, and the Immigration Reform and Control Act of 1986*, 16 REV. L. SOC. CHANGE 125 (1988) (discussing IRCA's increased protection for undocumented workers); Joseph Nalven, Comment, *Remedies for Undocumented Workers Following a Retaliatory Discharge*, 24 SAN DIEGO L. REV. 573 (1987) (proposing a model of remedies for undocumented workers that include back pay for future undocumented workers to further employer deterrent mechanism of IRCA); Lucinda M. Cardinal, Note, *Immigration Reform: Solving the "Problem" of the Illegal Alien in the American Workforce*, 7 CARDOZO L. REV. 223 (1985) (arguing that goals of immigration reform legislation should concentrate on enforcement of labor law rather than employer sanctions).

278. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1122.

279. Codified at 8 U.S.C. § 1324a(a) (1988).

the Board from awarding back pay to undocumented aliens wrongfully discharged after the IRCA's enactment."²⁸⁰ This reasoning reflects a fundamental misunderstanding of IRCA's purpose—not to undermine labor protections for undocumented workers.²⁸¹ Congress intended that IRCA's sanctions against employers, to diminish the incentive and advantage of hiring undocumented workers, *not* concurrently inhibit the "exercis[e] [of] [undocumented workers'] rights . . . or . . . activities protected by existing law."²⁸² Thus, both the enactment of the NLRA and the promotion of the collective bargaining process evince Congress' intention *not* to have the recognition of a union in certification proceedings stalled indefinitely while an employer forced a determination of the immigration status of every single one of its workers.²⁸³

To construe congressional intent to the contrary would adversely impact all workers. But, most important, it would eviscerate, through worker disunity,²⁸⁴ the goals of the NLRA "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."²⁸⁵

Moreover, contrary to the Seventh Circuit's analysis, IRCA applies to both undocumented workers hired prior to January 1, 1982—"qualifying workers"—and for those hired prior to November 6, 1986—"grandfathered" workers—as categories of undocumented workers eligible for legalization and exempt from IRCA's prospective reporting system.²⁸⁶ For those undocumented workers

280. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1122 (7th Cir. 1992).

281. See H.R. REP. NO. 682, 99th Cong., 2d Sess., pt. 1, at 58 (1986) (Report of Committee on the Judiciary), reprinted in 1986 U.S.C.A.N. 5662, microformed on CIS No. 86-H523-25 (Congressional Info. Serv.).

282. *Id.* See Mitchell, *supra* note 277, at 181; Blum, *supra* note 238, at 1375 (noting that IRCA "places responsibility for the employment of undocumented aliens squarely on the shoulders of United States employers").

283. See Alexander, *supra* note 277, at 136.

284. See Alexander, *supra* note 277, at 137; see also *id.* at 144 (arguing the ineffectiveness of employer sanctions under IRCA).

285. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984).

286. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3372, § 101(a)(3)(A) and (B) (reporting system and prohibition of employing "unauthorized aliens" does not apply to workers hired on or before November 6, 1986 the "grandfather clause"). IRCA provided for adjustment to lawful temporary resident status for undocumented aliens who had maintained continuous unlawful residence since January 1, 1982 between May 5, 1987 and May 5, 1988; *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216, 220 (1991). "The regulations enacted pursuant to IRCA provide that the 'grandfather' requirement of continuing employment is met where the employee is reinstated after a wrongful discharge or pursuant to a settle-

suffering a discriminatory discharge occurring after November 6, 1986—the date of IRCA's enactment—the legislation provides for the same, full NLRA protection as for citizens and legal residents, with qualifications for those hired between January 1, 1982 and November 6, 1986.²⁸⁷

In short, contrary to the Seventh Circuit's position, section 274A does afford a remedy for undocumented workers discharged after IRCA's enactment. Grandfathered workers would be denied reinstatement where an INS determination regarding their illegal status were made separate from their employer's retaliatory report and NLRA proceedings.²⁸⁸ Nevertheless, the remedy of back pay remains appropriate.²⁸⁹ In the case of undocumented workers hired after November 6, 1986, the same procedure could be followed. This is because the NLRB could disregard immigration status and IRCA for purposes of both the traditional remedies of reinstatement and back pay, unless the INS has made a specific determination that the worker was deportable.²⁹⁰ Only then could reinstatement compel an employer to violate IRCA,²⁹¹ but the back pay remedy would remain appropriate because it would further Congress' intended goal of the NLRA.²⁹² NLRA protection and IRCA's employer sanctions would work together to deter employers from knowingly hiring undocumented workers which, in turn, would further the goals of both acts.²⁹³ As the *Patel* court reasoned, without this threat of back pay liability, unscrupulous employers could disregard the risk of violating IRCA and hire undocumented workers for the attendant economic advantage.²⁹⁴

F. The Del Rey Tortilleria Majority Over-Estimates the Deterrence Value of the Cease and Desist Order

The Seventh Circuit also inappropriately relies on the deterrence value of the cease and desist order.²⁹⁵ In addition to the

ment." *Id.* (citing 8 CFR § 274a.2(b)(v) and (iii)(E), (G)).

287. *Id.* See Nalven, *supra* note 277, at 591.

288. *Id.* at 587.

289. *Id.*

290. See Fjelstad, *supra* note 188, at 612; O'Brien, *supra* note 42, at 214.

291. See Fjelstad, *supra* note 188, at 607-09, 612.

292. *Id.*

293. *Id.* at 610.

294. See *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988), *cert. denied*, 489 U.S. 1011 (1989).

295. See *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d 1115, 1120 (7th Cir. 1992).

traditional remedies of reinstatement and back pay, the NLRA mandates the National Labor Relations Board to remedy unfair labor practices by issuing cease and desist orders.²⁹⁶ Del Rey's conduct is testimony to the ineffectiveness of this cease and desist order.

The *Del Rey Tortilleria* court referred to the deterrence value of the cease and desist order in explaining that the *Sure-Tan* Court failed to correct Justice Brennan's criticism of the broad view of its holding.²⁹⁷ In his dissent, Justice Brennan criticized the court for creating an "anomaly" by holding that undocumented workers were employees under the NLRA while, in the same breath, depriving them of an effective remedy.²⁹⁸ Because the Court did not correct Justice Brennan, the Seventh Circuit dismissed his public policy argument,²⁹⁹ notwithstanding their striking similarities in reasoning.³⁰⁰ By relying on the Supreme Court's characterization of the effectiveness of the cease and desist order and the "threat of contempt sanctions [] provid[ing] a significant deterrent against future violation of the Act[.]"³⁰¹ the Seventh Circuit blindly applied a rule to this case.

Had the Seventh Circuit looked to the controversy of this case, it would have determined that, over the years, the Board had repeatedly issued orders directing the employer to cease and desist from its illegal conduct.³⁰² The Seventh Circuit, itself, enforced those orders, but to no avail.³⁰³ Del Rey continued to violate the NLRA, and used the settlement stipulation, which Del Rey later tried to evade, to avoid the consequences of its violations.³⁰⁴ Thus, even with this case, the Seventh Circuit has direct evidence of the

296. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 905 n.13 (1984) (threat of contempt sanctions seen as significant deterrent against future violations of NLRA).

297. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1120.

298. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. at 911 (Brennan, J., dissenting).

299. *Del Rey Tortilleria, Inc. v. NLRB*, 976 F.2d at 1120.

300. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. at 892-94.

301. *Id.* at 905 n.13.

302. *See Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 302 N.L.R.B. 216 (1991); *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 275 N.L.R.B. 1486 (1985), *enforced by*, *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d 1135 (7th Cir. 1987); *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 272 N.L.R.B. 1106 (1984), *enforced by*, *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118 (7th Cir. 1986).

303. *Del Rey Tortilleria, Inc. and Local 76*, 275 N.L.R.B. at 1486, *enforced by*, *NLRB v. Del Rey Tortilleria, Inc.*, 823 F.2d at 1135; *Del Rey Tortilleria, Inc. and Local 76*, 272 N.L.R.B. at 1106, *enforced by*, *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d at 1118.

304. *See Del Rey Tortilleria, Inc. and Local 76*, 302 N.L.R.B. at 218.

cease and desist orders' ineffectiveness. Additionally, because contempt penalties for violating a cease and desist order require the filing of an additional complaint, where the complaint involves an undocumented worker who, for obvious reasons, fears that such a complaint would prompt scrutiny of that worker's immigration status it is unlikely that such a complaint will ever be filed. Thus, the risk of contempt penalties for these violations is remote.³⁰⁵

As the Seventh Circuit previously pointed out, when enforcing cease and desist and reinstatement orders of the Board involving this same employer, Del Rey Tortilleria, Inc.,³⁰⁶ "[t]his case presents a classic case of anti-union behavior by a company."³⁰⁷ Those discriminatees wrongfully discharged during the union's organizing drive and representation election have never been reinstated.³⁰⁸ The employer continues to violate the NLRA—the basis for this dispute. Thus, the Seventh Circuit has both inadvertently rewarded the employer for its blatant anti-union conduct and augmented a conflict among the federal circuits.

V. CONCLUSION

On the surface, *Sure-Tan's* "plain language" denying back pay to undocumented workers "during any period when they [are] not lawfully entitled to be present and employed in the United States" supports the *Del Rey Tortilleria* court's holding. Thus, when *Sure-Tan* is read out of context, it supports the *Del Rey Tortilleria's* holding that Bravo and Paredez are not entitled to back pay because they stipulated to being undocumented aliens. However, *Sure-Tan* does not stand for the proposition that undocumented workers are not entitled to the NLRA remedial provisions because they are undocumented workers. Rather, it more correctly holds that undocumented workers are employees entitled to NLRA protection against unfair labor practices, but not entitled to back pay relief without showing their legal availability for work. Courts must construe *Sure-Tan* narrowly to effectuate firmly-rooted public policy, as expressed by the Supreme Court in *Sure-Tan* and by Congress in its legislative history, *not* to restrict the

305. See *Local 512, Warehouse and Office Workers Union v. NLRB*, 795 F.2d 705, 718-19 (9th Cir. 1986).

306. See *Del Rey Tortilleria, Inc. and Local 76, International Ladies Garment Workers Union*, 272 N.L.R.B. 1106, 1109 (1984).

307. *NLRB v. Del Rey Tortilleria, Inc.*, 787 F.2d 1118, 1123 (7th Cir. 1986).

308. See *supra* note 104 and accompanying text.

remedy for unfair labor practices against undocumented employees. Thus, *Sure-Tan's* remedial holding should apply only to those who are unavailable for work because they are both outside the United States and unable to re-enter legally.

The Ninth, Second, and Eleventh Circuits saw the threshold issue surrounding undocumented workers as one of protecting U.S. workers' jobs and working conditions by eliminating employers' incentives to exploit unprotected aliens. The Ninth and Second Circuits sought to further the goal of the NLRA and the INA by restricting *Sure-Tan's* remedial holding to discriminatees physically outside the United States. In fact, the Eleventh Circuit held that *Sure-Tan* was not controlling. In short, all three federal circuits agreed that wrongfully discharged undocumented workers had suffered legal harm for which the law provided a remedy.

When the Supreme Court³⁰⁹ resolves the conflict created by *Del Rey Tortilleria*, the words of Justice Kennedy, then an appellate court Judge for the Ninth Circuit,³¹⁰ will provide compelling guidance. Justice Kennedy wrote, "[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" ³¹¹ Thus, refusing to provide undocumented employees with the very NLRA union protections that Congress unambiguously intended, frustrates not only the purposes of the NLRA, but the INA as well.

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309. Four new Justices have joined the Court since it handed down its decision in *Sure-Tan*. Justice O'Connor wrote the plurality decision in which Chief Justice Burger and Justice White concurred. Justice Rehnquist and Justice Powell joined in the remedial portion, but dissented from the liability portion of the opinion. Justices Brennan, Marshall, Blackmun, and Stevens joined on the issue of liability, but dissented from the remedial portion. See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984).

310. *NLRB v. Apollo Tire, Co.*, 604 F.2d 1180 (9th Cir. 1979) (Kennedy, J., concurring) (holding that undocumented workers are employees under the NLRA and enforcing the Board's order of reinstatement and back pay for undocumented workers).

311. *Id.* at 1184.

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